C. A. V. — 14511 till Oct T. 1872

Reversed

Strong writes

Judge Davis

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~372.~~ 168

THE GORHAM MANUFACTURING COMPANY, APPELLANT,

vs.

GEORGE C. WHITE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED DECEMBER 9, 1870.

Gifford

p 52, 53 - Exhibits 9 & 10 -

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SUPREME COURT OF THE UNITED STATES.

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1 **Circuit court of the U. S. southern district of New York.**

To the honorable the judges of the said court, sitting in equity:

The "Gorham Manufacturing Company," a corporation created and doing business under and by virtue of a special act of the legislature of the State of Rhode Island, brings this its bill of complaint against George C. White, of the city of New York, in the State of New York.

And thereupon your orator complains and says that John Gorham, Gorham Thurber, and Lewis Dexter, jr., being citizens of the United States, then doing business in the city of Providence, in the State of Rhode Island, under the firm-name of Gorham & Co.; and being the true and original producers of a new design for spoon and fork handles, which was not known or used by others before the invention and production thereof by them, made application to the Commissioner of Patents of the United States for letters-patent for such design, and having fully and in all respects complied with all the requirements of the law in that behalf, and especially having made oath that they verily believe themselves to be the original and first inventors or producers of the said design, and having also paid into the Treasury of the United States the sum of thirty dollars, and presented a petition to the Commissioner of Patents of the United States signifying a desire of obtaining an exclusive property in the said design, and praying that a patent might for that purpose be granted unto them, and also having delivered and filed in the office of the said Commissioner of Patents, a written description in such full, clear, and exact terms as to enable
2 any one skilled in the art to make and use the same, which said
description was duly signed by them and attested by two witnesses; whereupon the said Commissioner of Patents caused letters-patent to be made out in the name of the United States of America, in due form of law in all respects, bearing date the sixteenth day of July, in the year one thousand eight hundred and sixty-one, whereby there was granted unto the said John Gorham, Gorham Thurber, and Lewis Dexter, jr., then as aforesaid doing business under the firm-name of Gorham & Co., their heirs, administrators, or assigns, for the term of fourteen years from the date thereof, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said design, which is entitled in said letters-patent, "design for spoon and fork handles;" and the letters-patent having been signed by Caleb B. Smith, Secretary of the Interior, and countersigned and sealed with the seal of the Patent Office by D. P. Holloway, Commissioner of Patents, and the same having been duly recorded, were issued and delivered unto the said John Gorham, Gorham Thurber, and Lewis Dexter, jr., as by said letters-patent or a duly-authenticated copy thereof, here in court to be produced, will more fully and at large appear.

And your orator further shows unto your honors that the said John Gorham, Gorham Thurber, and Lewis Dexter, jr., as said firm of Gorham & Co., were at the time of the production of the said design, and for some time thereafter, extensively engaged in the business of manufacturing spoons and forks, and from the time of the grant of the said letters-patent, and thence afterwards, they did extensively manufacture and sell spoons and forks according to the said design.

And your orator further shows unto your honors that, in pursuance of a decree in chancery, on the seventh day of February, in the year one thousand eight hundred and sixty-three, the said Lewis Dexter, jr., by

an instrument in writing under his hand and seal, transferred and
3 set over unto the firm of Gorham & Co., which by the withdrawal
of the said Dexter, then consisted of John Gorham and Gorham Thurber, above named, all his right, title, and interest in all the property, real and personal, of the said firm, which included all his right, title, and interest in and to the before-recited letters-patent, and design thereby secured, as by said deed of transfer, or a duly-authenticated copy thereof, here in court to be produced, will more fully and at large appear.

And your orator further shows unto your honors that the said John Gorham and Gorham Thurber, composing the firm of Gorham & Co., did, by an instrument in writing under their hands and seals duly executed and bearing date the second day of January, in the year one thousand eight hundred and sixty-five, grant and convey unto your orator, the "Gorham Manufacturing Company," all the property, real, and personal, of the said firm of Gorham & Co., which included all their right, title, and interest in and to the before-recited letters-patent and invention thereby secured, as by said deed of transfer, or a duly-authenticated copy thereof here in court to be produced, will more fully and at large appear.

And your orator further shows unto your honors that the defendant herein is selling large quantities of spoons and other articles containing and embodying the invention described and claimed in the before-recited letters-patent so granted and issued to John Gorham, Gorham Thurber, and Lewis Dexter, jr., and assigned to your orator, as aforesaid, and your orator has reason to believe that he will continue to sell such articles, and is thereby causing your orator great and irreparable damage, and refuses to pay to your orator any of the profits which he has made by such unlawful selling, or to desist from selling the same, all of which is in violation and infringement of your orator's right secured to your orator, as aforesaid, and against your orator's consent or allowance.

And your orator further shows unto your honors on information and belief, that since the said Lewis Dexter retired from the said firm of
Gorham & Co., the remaining partners continued to manufacture
4 quantities of spoons and forks according to the said design, and
to sell the same; and since the said letters-patent were transferred to the said Gorham Manufacturing Co., the said company has continued to manufacture spoons and forks according to the said design and to vend large quantities thereof, and would have sold more but for the wrong-doings of the said defendant.

All which actings and doings of the said defendant are contrary to equity and good conscience, and tend to the manifest injury of your orator in the premises. In consideration whereof, and forasmuch as your orator can only have adequate relief in this honorable court where matters and things of this kind are made cognizable by statute: To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief hereby prayed, and may upon his corporal oath, and according to his best and utmost knowledge, information, remembrance, and belief, full, true, direct, and perfect answer make to the matters and things hereinbefore stated and charged; and that the said defendant may answer the premises, and that he may be decreed to account with, and pay over to, your orator the profits which he has made by such unlawful selling—

And may it please your honors, the premises considered, to grant unto your orator the writ of injunction issuing out of and under the seal of this honorable court, or issued by one of your honors, according to the form of the statute in such case made and provided, enjoining and restraining the said George C. White, his clerks, attorneys, agents, servants, and workmen, from selling spoons, forks, or other articles containing and embodying the said invention and design; and that your orator may have such other and further relief as the nature of the case may require, and to your honors shall seem meet.

May it please your honors to grant unto your orator, not only the writ of injunction conformable to the prayer of this bill, but also a writ of subpœna directed to the said George C. White, commanding him on a
certain day therein to be named, to be and appear in this honor-
5 able court, then and there to answer the premises, and to stand
to, perform, and abide such further order, direction, and decree
as may be made against him.

And your orator, as in duty bound, will every pray, &c.

CHA'S M. KELLER,
Solicitor, of Counsel.

6

7 United States circuit court southern district of New York.

The "Gorham Manufacturing Company"
vs.
George C. White.
} In equity.

The answer of George C. White, defendant, to the bill of complaint of the above-named complainants.

This defendant now and at all times hereafter saving and reserving to himself all manner of benefit and advantage of exception that can or may be taken or had to the many errors, insufficiencies, and imperfections in the said bill of complaint contained, for answer thereto, or to so much thereof as he is advised it is material or necessary for him to make answer unto, answering, says:

That he admits that letters-patent of the United States were granted to John Gorham, Gorham Thurber, and Lewis Dexter, jr., for an alleged new design for spoon and fork handles, dated the 16th day of July, 1861, but whether or not said patent was applied for and issued as stated in said bill of complaint this defendant does not know, and is not informed save by said bill of complaint, and leaves the complainants to make such proof thereof as they may be advised is material.

And this defendant, further answering, says that he does not know,
and is not informed, save by said bill of complaint, whether or not
8 said Lewis Dexter, jr., did on the 7th day of February, 1863, as-
sign all his right, title, and interest in and to said letters-patent
to said Gorham & Thurber, as stated in said bill, or whether or not the said Gorham and the said Thurber did, on the 2d day of January, 1865, assign all their right, title, and interest in and to said letters-patent to the Gorham Manufacturing Company, as stated in said bill; or whether or not said John Gorham, Gorham Thurber, and Lewis Dexter, jr., used, or said complainants are now using said alleged new design, as stated in said bill of complaint, and leaves the complainants to make such proof thereof as they may be advised is material.

And this defendant, further answering, denies that he is now making, using, or selling, or ever has made, used, or sold, any spoons, forks, or other articles like or substantially like those described in said patent, or having or containing the design patented by said patent; and he says that he has never made, used, or sold any spoons, forks, or other articles having or containing any design or right which is or was secured by said patent; and this defendant denies that he has ever infringed said patent.

And this defendant, further answering, says that, to show the state of the art which preceded the time of the alleged invention of said John Gorham, Gorham Thurber, and Lewis Dexter, jr., he refers to and will put in evidence designs and spoons having thereon designs which, prior to that time, were known to and made and sold by Charles Wood and Charles H. Hughes, at the city of New York, both of whom now reside in said city of New York; by Henry Hibbard, at the city of New York, and who now resides in said city of New York; and by John Farrington and George W. Hunnewell, at the city of New York, and at the city of Boston, in the State of Massachusetts, both of whom now reside in said city of Boston.

And this defendant prays the same benefit of the facts and things herein set forth as if, for the reason thereof, the said bill had been demurred to, where a demurrer would have been proper, and the same benefit thereof as if they had been specially pleaded to the said bill.

9 And this defendant submits to this honorable court that said complainants have no right to any further answer to said bill, or any part thereof, than is hereinabove contained, and no right to any injunction, account, or other relief prayed for in said bill; and this defendant prays to be hence dismissed, with his reasonable costs and charges, in this behalf most wrongfully sustained.

GEO. C. WHITE.

GEO. GIFFORD,
Solicitor and of Counsel for Defendant.

UNITED STATES OF AMERICA,
Southern District of New York,
City and County of New York, ss:

On this 19th day of June, 1867, before me personally appeared George C. White, who, being by me duly sworn, did depose and say that he has read the foregoing answer subscribed by him, and knows the contents thereof, and that the same is true, of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

[SEAL.]

MELVILLE BIGGS,
Notary Public, New York County.

10 Circuit court of the United States for the southern district of New York.

GORHAM MANUFACTURING COMPANY
vs.
GEO. C. WHITE.
} In equity.

The replication of the Gorham Manufacturing Company, complainants, to the answer of George C. White, defendant.

These repliants, saving and reserving unto themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto, say that they will aver and prove their said bill to be true, certain, and sufficient in the law to be answered unto; and that the said answer of the defendant is uncertain, untrue, and insufficient to be replied unto by these repliants; without this that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied is true. All which matters and things these repliants are and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

CHA'S M. KELLER,
Complainant's Solicitor.

11 United States circuit court southern district of New York.

GORHAM MANUFACTURING COMPANY
vs.
GEORGE C. WHITE.
} In equity.

Testimony taken under the 67th rule of the Supreme Court of the United States as amended.

NOVEMBER 30TH, 1869.

Present, Cha's F. Blake, esq., counsel for the complainants, and George Gifford, esq., counsel for the defendant.

Counsel for complainants puts in evidence certified office copy of letters-patent of the United States granted to John Gorham, Thurber, and Lewis Dexter, jr., of Providence, R. I., dated July 16th, 1861, and numbered design No. 75, whole number 1440, and marked Complainants Exhibit A.

GEORGE C. WHITE, being called as a witness for the complainants, and being duly sworn, deposes as follows:

Q. 1. What is your name, age, residence, and occupation?

12 A. George C. White; my age is sixty-two; residence, Brooklyn, Kings County; and occupation, agent for Rogers & Brother, plated-ware manufacturers. They manufacture forks, spoons, etc.—what is known in the trade as flat goods. They also deal in hollow ware, having a shop here to plate and replate it.

Q. 2. Where is the place of manufacture of Rogers & Bro.?

A. They are an incorporated company, and manufacture in Waterbury, Conn., having a shop here and salesroom.

Q. 3. Have they a shop and salseroom anywhere else; and if so, where?

A. Not to my knowledge, sir.

Q. 4. How long have you been the selling agent of Rogers & Bro. in New York?

A. I think about eight years. I think it was about 1862 or '3 I commenced. During the first few years it was only in a small way. I had other business at that time.

Q. 5. Who was the selling agent of Rogers & Bro. in New York, if any one, before yourself.

A. No one, sir. I was the first.

Q. 6. When did Rogers & Bro. commence the manufacture of flat goods?

A. About ten years ago, as well as I can remember. It may have been twelve or fifteen. I don't recollect.

Q. 7. Will you look at Complainants' Exhibit C, and Complainants' Exhibit D, and Complainants' Exhibit E, and state whether or not you have sold forks and spoons of the pattern or design of said exhibits since you have been in business as the agent of Rogers & Bro.?

A. We have, sir.

Q. 8. When did you begin to sell them?

A. I think about three years since, more or less; less, perhaps.

Q. 9. Have you continued to sell them ever since?

A. No, sir; not to my recollection or knowledge.

Q. 10. When did you cease to sell them?

A. I think two years ago last April I was called on respecting
13 this suit. We then ceased making them, as I was informed by
one of the company, not having been at the factory myself, that
they discontinued making them on commencement of this suit.

Q. 11. When did you cease selling them?

A. I couldn't tell you.

Q. 12. How many did you sell of such goods?

A. I could not tell you. We never kept a record, and so could not tell you what patterns we sold. We keep no record further than by entry on salesbook, where a record of all patterns sold is kept.

Q. 13. By what name did you designate these goods?

A. The Gothic.

Q. 14. Can you tell by examining your books how largely you sold the Gothic pattern?

A. I don't think we could tell certainly in regard to the pattern shown me.

Q. 15. Why not?

A. We changed this pattern two years and a half ago, and still called it Gothic.

Q. 16. Will you look at Complainant's Exhibit F, and state whether or not you have ever sold forks and spoons of that design or pattern?

A. Yes, sir.

Q. 17. When did you begin to sell goods like Complainant's Exhibit F, and when did you cease to do so, if ever?

A. I don't recollect, sir. It is hard to answer, as it seems a variation from our old pattern. It looks as if it might have been altered from our pattern—an infringement.

Q. 18. An infringement of what?

A. Of what is said to be the Gorham patent.

Q. 19. When did you change from the first Gothic pattern to the pattern of Exhibit F?

A. I don't know, sir. I could not tell you.

Q. 20. Did Exhibit F also bear the name of the Gothic pattern?

A. It does.

Q. 21. Did you ever sell any other goods under the title of the
14 Gothic pattern; and if yea, look at Complainant's Exhibit G, and
state whether or not they were goods like it?

A. Yes, sir.

Q. 22. State as nearly as you can, using your best judgment and knowledge of your business, how many goods of the Gothic pattern you have sold.

A. I could not make a statement. I could not name an amount, they are so mixed up with other patterns.

Q. 23. Would your books show; and if yea, will you produce them, and state from them what they show?

A. My books would show. I will produce a memorandum and annex it to this deposition.

Q. 24. What proportion of your business has been the sale of flat goods?

A. About three-quarters, sir, more or less.

Q. 25. State what is your best belief as to what proportion of the flat goods sold by you were of the Gothic pattern.

A. It would be sort of boy's work to guess, but I should guess about one-eighth, more or less.

Q. 26. Do you know by what name the Gorham Manufacturing Company's goods, which the Gothic pattern is said to infringe, are known in the market?

A. I think they call it the Cottage. I don't know that I should know it if I should see it.

Q. 27. Did any of your customers, in looking at or buying of you your Gothic pattern goods, ever call them the Gorham Cottage pattern, or imitation Gorham Cottage pattern?

A. I don't recollect. If they have it's not been done within the last two years to my knowledge, and I don't recollect before. Still I may have had some conversation, but couldn't locate the time or person.

Q. 28. Have you had any conversation with any of your customers about the Gothic pattern being the same, or substantially the same, as the Gorham Cottage pattern?

A. I think that, about two and a half years ago, some of our customers were speaking about it, and saying that our Gothic pattern 15 somewhat resembled the Cottage pattern, but we had a patent for ours.

Q. 29. Didn't some of them say that their customers took the Gothic pattern for the Gorham Cottage pattern, or something to that effect?

A. They may have said so—I don't say whether they did or not, it was so long ago; but our pattern was plate and theirs silver. It was so long ago that I cannot remember common talk. I may have said so to some silversmith; possibly I did.

Q. 29. Did you sell your Gothic pattern to go to all parts of the country?

A. Generally I did.

The right of cross-examining this witness is reserved.

GEO. C. WHITE.

GEO. C. WHITE, jr., being called as a witness for the complainant, and being duly sworn, deposes as follows:

Q. 1. What is your name, age, residence, and occupation?

A. Geo. C. White; my age is twenty-seven; reside in Brooklyn; I am with my father, as clerk, with an interest.

Q. 2. How long have you been associated with your father in his business as selling agent for Rogers & Bro.?

A. Almost since the company was started; I should think six or seven years.

Q. 3. Do you know when your father ceased to sell goods of the exact pattern of Complainant's Exhibits C, D, and E.?

A. I couldn't say.

Q. 4. Give us your best recollection.

A. Well, I should think that three years ago, more or less.

Q. 5. By what fact do you fix the time in your mind?

A. From the fact that I suggested to them—our factory folks—myself, that that spoon (Complainant's Exhibit E) was too stiff in outline, and could be improved by hollowing it a little at the handle, 16 which was done, the same as Complainant's Exhibit F.

Q. 6. Was this suggestion made before or after the commencement of this suit?

A. Well, sir, I am quite sure it was made before. From the first time I saw the spoon I thought it was too stiff.

Q. 7. To whom was this suggestion made?

A. To Mr. Leroy S. White.

Q. 8. Who and what was Mr. Leroy S. White?

A. He has the charge of getting up the dies.

Q. 9. You mean that he cuts the dies himself?

A. No, sir.

Q. 10. Does he make the designs for the dies?

A. Yes, sir.

Q. 11. Who cut the dies?

A. I don't know.

Q. 12. When was the die for Complainants' Exhibit F made first?

A. I couldn't state the time.

Q. 13. When was the change from Complainants' Exhibit F to Complainants' Exhibit G made?

A. I think that one die like Exhibit G was made as an experiment, about or nearly the same time as the die for Exhibit F was made. The reason why that was done was because there was a diversity of opinion among us as to how much it should be hollowed out to be a graceful outline, and the one marked G was finally adopted.

Q. 14. How long did you continue to sell goods like Exhibit F?

A. I have no means of knowing.

Q. 15. When did you begin to put goods on the market like Complainants' Exhibit G?

A. I can't say positively, but I should think about two years ago.

Q. 16. By what fact do you fix the date?

A. Well, by guessing.

17 Q. 17. Have you no fact in your mind with which this change is so associated as to enable you to guess with accuracy?

A. No, sir; except judging from the lapse of time, that is all.

Q. 18. Do you consider that there is any substantial difference in pattern or design between Complainant's Exhibits F and G?

A. Yes, sir.

Q. 19. Why, then, did you put them on the market by the same name?

A. I did not name them.

Q. 20. Who did name them?

A, I don't recollect who did name them. I might have named them. Different names were suggested. I'm quite sure I didn't name them.

Q. 21. Are not the different styles of flat goods known and designated by their different names?

A. Usually, not always.

Q. 22. Give an instance.

A. Some call the Empire pattern the Olive.

Q. 23. Give an instance where a manufacturer sells two substantially different styles of goods of his own make by the same name or designation.

A. For instance, after a style or number, as we call it, runs out, sometimes the same designating number is given to another design for an article of the same character.

Q. 24. Can you give any instance where when an article of flat goods, ornamented with a particular design, has been put upon the market by a manufacturer under a given name, the same manufacturer has afterwards put upon the market the same article of flat goods, ornamented with a substantially different design, under the same name?

A. Yes, sir; the Tuscan and the Brunswick pattern. I do know of an instance where a manufacturer sold goods in this manner.

Q. 25. Were the Tuscan and Brunswick patterns a case of calling different designs by the same name, or calling the same design by two names?

18 A. Different designs by different names.

Q. 26. State, if you please, any two articles of flat goods, ornamented with substantially different designs, and made by the same manufacturer, which are put upon the market by the manufacturer under the same name?

A. I can answer that if you can tell me what a manufacturer is?

Q. 27. What do you understand a manufacturer to be?

A. If the man imports these forks or spoons unplated, and plates them in his own manufactory, and stamps his trade-mark on them, and sells them with other forks which he does make the basis of, that he is considered by the trade generally a manufacturer of those forks which he sells. That is what I consider a manufacturer.

Q. 28. Will you now answer question 26?

A. Well, the Brunswick and the Tuscan.

Q. 29. Are the Brunswick and the Tuscan the same or different goods?

A. Both.

Q. 30. Can you name any manufacturer who makes flat goods from the metal, who has given to an article of flat goods ornamented with a specific design, a specific name, which designates the pattern, and who has afterwards put upon the market the same article of flat goods with a substantially different design under the same name, as that which designates the pattern of the first article?

A. I do not recall any case except the present. No doubt there are such cases.

Q. 31. Are not the names given to designs on spoons and forks understood by the trade and public to indicate that the goods bearing any given name, have the design to which that name belongs?

A. Usually so.

Q. 32. Is not that the purpose and value of a name?

A. It is.

Q. 33. When a certain pattern or style of goods have become known in the market under a certain name, is not that name valuable to the manufacturer and seller of those goods as a means of selling the article to which that name belongs?

19 A. I don't know that it is particularly valuable. It is a convenience.

Q. 34. Do you then consider it honest or proper to sell under the name of goods, known by a name in the market, other goods substantially different in pattern and design?

A. Yes, sir; when you advertise the fact that you give that name to a pattern essentially different to the first one you gave it to. To do it covertly I should consider dishonest.

Q. 35. Did you advertise your change of form from Complainant's Exhibit F to Complainant's Exhibit G; and if so, how extensively?

A. By our samples which we displayed in selling the goods, and by showing it to customers generally.

Q. 35½. Then Exhibit F and Exhibit G continued to be on sale by you at the same time, did they?

A. I could answer yes and no to that question, as we had the spoon, sample G, exposed for sale, and what few we had on hand of F were probably marked "old," and in the stock not exposed for sale, unless called for.

Q. 36. When your customers ordered Gothic pattern, in person or by letter, which did you furnish them?

A. With G.

Q. 37. How did you advertise to those who ordered by letter that the Gothic pattern G was substantially different from the Gothic pattern F?

A. We did not advertise to them. It is not customary for a manufacturer to notify his customers whenever he changes a die.

Q. 38. Not when he calls the goods made by the changed die by the old established name?

A. No; unless there was a more marked difference in the style of the goods. If he ordered F, we would send him G, as we would think it would suit him as well.

Q. 39. How large a part of your business is selling the Gothic pattern, as near as you can fix it?

A. I haven't the least idea.

20 The right of cross-examining this witness is reserved.

G. C. WHITE, Jr.

Subscribed and sworn to before me this 30th day of Nov., 1869.

JOHN A. SHIELDS,
Examiner, &c.

Edward C. Moore, being called as a witness for the complainrnt, and being duly sworn, deposes as follows:

Q. 1. What is your name, age, residence, and occupation?

A. Edward C. Moore; I am forty-two years of age; reside at Yonkers; and am of the firm of Tiffany & Co.; a practical silversmith.

Q. 2. What is your department in the firm of Tiffany & Co.?

A. The silver-ware department; particularly the manufacture of silver.

Q. 3. Have you had any experience in preparation of designs for silver-ware, and more especially of spoons and forks; and if so, state what your experience has been in full detail?

A. I have had experience in designing silver-ware, particularly spoons and forks, and I have been engaged for more than twenty years in such designing. I began on my own account, and have worked exclusively for Tiffany & Co. for eighteen years.

Q. 4. State for what you have made designs—for what different branches of silver work.

A. For hollow-ware and spoons and forks.

Q. 5 From your knowledge of the silver-ware manufacturing business, and especially your knowledge of the manufacture of forks and spoons, state, if you please, how important the beauty and fitness of designs for paterns of forks and spoons are to the business of manufacturing silver-ware.

21 A. The whole sale of forks and spoons depends entirely on the beauty and fitness of the design.

Q. 6. When a design has become established as a popular pattern for spoons and forks, state whether or not such design has any influence upon the success of the business of its owners?

A. Such designs go to make the success of the business.

Q. 7. Are you accustomed to examine different patterns for forks and spoons, and to note the differences between them; and how long have you been so accustomed?

A. I have; for upward of twenty years.

Q. 8. Have you read the letters-patent, marked "Complainant's Exhibit A," in this cause?

A. I have.

Q. 9 Will you look at Complainant's Exhibits C, D, E and F, and state whether or not, in your opinion, the designs which they exhibit are substantially the same as that described in Complainant's Exhibit A?

A. Not substantially the same, but evidently intended to appear the same.

Q. 10. What do you mean by "substantially the same?"

A. The pattern or ornament is not the same substantially.

Q. 11. State whether or not the design of these exhibits is so nearly like that described in the patent that the ordinary purchaser would be lead to mistake these exhibits for articles exactly like those described in the patent.

A. I think he would. It seems to me that is what it was made for.

Q. 12. Are the differences between the pattern described in the patent and the pattern of the exhibits such as would be apt to be detected by ordinary purchasers.

A. I should think not.

Q. From your experience as a designer, what do you say as to whether two designs so nearly alike would be likely to be produced by different designers without the designer of the pattern made latest in time knowing of the pattern earlier in time?

22 A. I shouldn't think such a thing could happen.

Q. 14. From your knowledge as a designer, what should you say as to whether the designer of the one pattern imitated the pattern of the other designer?

A. I should think that the designer of Complainant's Exhibits C, D, E, F, must have intended to imitate the effect in spirit, and yet make a difference.

Q. 15. If spoons and forks, made after the pattern described in the patent, had obtained a reputation and position in the trade, would spoons and forks of the pattern of these exhibits find sale by reason of the popularity of the forks and spoons just mentioned?

A. I should think these could be sold for the same thing.

Q. 16. Would the trade be led to buy them by reason of the close resemblance to the pattern described in the patent?

A. I should think not.

Q. 17. If there be in the market a given pattern of forks and spoons in silver, how would its sale be affected by an imitation of that pattern in plated ware?

A. I should think it would be fatal to the sale of the silver.

Q. 18. From your knowledge of the business, what is your opinion of the value and merit of the design described in Complainant's Exhibit A?

A. I think it is the best pattern for general sale that has been in the market since my time.

E. C. MOORE.

Subscribed and sworn to before me this 30th day of November, 1869.

JOHN A. SHIELDS,
Examiner, &c.

Charles T. Cook, being called as a witness for the complainant, and being duly sworn, deposes as follows:

Q. 1. What is your name, age, residence, and occupation?

23 A. Charles T. Cook; I am thirty-four years of age; reside in New York, and am a member of the firm of Tiffany & Co.

Q. 2. Of what branch of the business of Tiffany & Co. have you had charge, and how long have you been in that house?

A. About twenty-three, and more than twenty, years. At present I have a general supervision of the business.

Q. 3. Are you acquainted with the different styles of spoons and forks which have been in the market for the last ten or fifteen years; and have you been accustomed to examine them and note the difference between them?

A. I have been familiar with the different patterns of spoons and forks that have been in the market, and for many years have examined them particularly.

Q. 4. Have you read the letters-patent—Complainant's Exhibit A?

A. I have.

Q. 5. Will you look at Complainant's Exhibit C, D, E, and F, and state whether or not their pattern is substantially like the pattern described in Complainant's Exhibit A?

A. I should say it was.

Q. 6. State whether or not an ordinary purchaser would be likely to take the pattern of these exhibits for the pattern described in Complainant's Exhibit A.

A. I should think they would.

Q. 7. When did you first see spoons and forks like Complainant's Exhibits H, I, J, and K?

A. I could not state the time positively, but I should think about eight or nine years.

Q. 8. By whom were they shown to you?

A. By Mr. Adams, of the Gorham Manufacturing Company.

Q. 9. Did you form or express any opinion at that time in regard to the marketable value or beauty of design of the pattern of Complainant's Exhibits H, I, J, and K; and if so, what was it?

A. Well, I remember that the pattern struck me so forcibly as
24 being the handsomest and best and most salaeble that I had ever
seen, in my opinion, and I predicted for it a great success; that I recollect expressing myself to that effect, but it was so long ago that I cannot recollect my exact language. My opinion of it at present is that it is the best of all plain patterns, and has not been equalled yet.

Q. 10. What influence have the patterns or designs used in the manufacture of spoons and forks upon the success of the business?

A. It is the groundwork of the business. Your success in business depends on the beauty and elegance of your design. Forks and spoons are sold at a uniform price, as a general thing, and the competition is in the designs.

Q. 11. What is the expense and difficulty of getting popular designs for forks and spoons?

A. The expense lies in employing skillful designers, who make a number of elegant designs, and yet not one in ten will be popular.

Q. 12. State whether or not any expense attends the introduction of new styles; and if so, wherein that expense consists.

A. There is the expense of cutting and making the steel rolls or dies.

Q. 13. How many dies are usually employed in producing the new styles of forks and spoons, and how much does it cost to make them?

A. The number of dies or rolls depends on the number of pieces the manufacturer wishes to produce. It generally costs about six or seven hundred dollars.

Q. 12. If there be in the market a popular pattern, in silver, of forks and spoons, how will the value of that pattern be affected by an imitation in plated ware?

A. It would be very much injured in value.

Q. 15. Please state of what Complainant's Exhibits C, D, E, and F are made, and of what Complainant's Exhibits H, I, J, and K are made?

A. C, D, E, and F are plated, and H, I, J, and K are silver.

25 Q. 16. Can dies used to produce patterns for plated spoons and forks be used for forks and spoons in silver?

A. Yes, sir; certainly.

Cross-examined:

Cross-q. 17. Has the firm, of which you are a member, ever sold spoons and forks containing the design described in Complainant's Exhibit A?

A. Yes.

Cross-q. 18. From what time to what time, as nearly as you can state?

A. From the time they were first put upon the market, I think, and we are selling them at the present time.

Cross-q. 19. Have you sold as many of that design as of any other?

A. That I couldn't state, I have sold such a variety of patterns.

Cross-q. 20. Have your sales of spoons and forks containing that design, been considerable or otherwise?

A. I should say they had been considerable.

Cross-q. 21. Did your firm manufacture these forks and spoons?

A. No; all we have sold of that design have been purchased of the Gorham Company.

Cross-q. 22. What do you consider to be the design in Complainant's Exhibit A?

A. We should place it in the trade under the head of a threaded design.

Cross-q. 23. Do you consider that the patent of the Complainant's Exhibit A includes all designs that you denominate threaded?

A. No.

Cross-q. 24. You have read, you say, complainant's patent, Exhibit A. State as minutely as you are able, what design you consider described therein.

A. I have in my hand a spoon which I believe to be manufactured under that patent. There is a thread running on either side of 26 the shank meeting a thread which reaches from the tip of the spoon and terminates in a scroll, where it meets the thread on the side of the shank.

Cross-examination of this witness adjourned till Thursday, December 2, at 10 a. m., and the examination adjourned till December 1, 1869, at 10 a. m.

NEW YORK, *December* 1*st*, 1869—10 a. m.

Present, counsel as before.

EGBERT W. SPERRY, being called as witness for the complainant, and being duly sworn, deposes as follows:

Q. 1. What is your name, age, residence, and occupation?

A. Egbert W. Sperry; I am fifty years old last August, the twenty fourth day; my residence, Wolcottville, Conn.; I am a manufacturer in German-silver, of forks, spoons, etc., for Redfield & Rice Manufacturing Company.

Q. 2. For how many years have you been engaged in the manufacture of forks and spoons?

A. Thirty-seven years.

Q. 3. Have you had any experience in examining various patterns of forks and spoons, and of comparing them together?

A. I have.

Q. 3. Have you read the letters-patent, Complainant's Exhibit A, and do you understand them?

A. I have, and I do.

Q. 4. Will you look at the Complainant's Exhibits C, D, E, and F, and compare them with the design described in Complainant's Exhibit A, and state whether or not, in your opinion, the pattern of the exhibits is or is not substantially like the design described in Exhibit A?

A. I should say it was so, certainly; calculated to deceive any one but an expert, as the Complainant's Exhibit D, and the other like exhibits are made with a single thread, and the design in Complainant's Exhibit A, being with a double thread. Any person seeing one 27 of these exhibits or articles like them at the end of the table, and examining one like the design in Complainants' Exhibit A, at the other end of the table, could not tell the difference between them. Not one man in fifty.

Q. 5. What is the average cost of getting up a full set of dies for a new pattern of forks and spoons?

A. That would depend upon the number of articles to be produced. In asking that question, forks and spoons do not cover the whole ground, as dies for ladles and knives and other articles must be considered. In my opinion, the whole cost would be about three or four thousand dollars. That is what it would cost me as being in the business, but to an indifferent party it would cost nigh six thousand dollars. You will understand me in general terms, the dies alone would not cost this; but rolls are as necessary as dies, and the tools to produce them. I speak of indifferent parties, parties not in the business, going to work to get up a set of tools. Manufacturers have these tools on hand.

Q. 6. State whether or not Redfield & Rice Manufacturing Company are largely engaged in the manufacture and sale of plated spoons and forks, and how their business compares with other manufacturing houses.

A. They are. To the best of my judgment, there is but one house that makes more goods than they do, and I am not positive that they are not the largest manufacturers in the country. Rogers & Bro., of Waterbury, make more goods than Redfield & Rice.

Q. 7. State whether or not they also manufacture forks and spoons in metal for other houses.

A. They do.

Cross-examination:

Cross-q. 8. For what houses do the Redfield & Rice Manufacturing Company manufacture spoons and forks in metal?

A. You ask me a question I cannot answer. They manufac- 28 ture for all who choose to buy. I am not supposed to know them all.

Cross-q. 9. Name any.

A. I wouldn't be supposed to know any.

Cross-q. 10. In what way are you connected with the Redfield & Rice Manufacturing Company?

A. I am superintendent of all their business in Wolcottville, in doors and out.

Cross-q. 11. Have you ever had occasion to manufacture spoons and forks or other articles, embracing the design described in the letters-patent, Complainant's Exhibit A, which you have read ?

A. I never made any of that kind, sir.

Cross-q. 12. When did you first see said Complainant's Exhibit A, letters-patent ?

A. Yesterday.

Cross-q. 13. What do you consider the design described in said letters-patent, Complainant's Exhibit A, to consist of ?

A. It consists of a design.

Cross-q. 14. Question repeated.

A. It consists of a design, I don't see any other way of answering.

Cross-q. 15. After thirty-seven years' experience in this business, can you not point out in what particulars this design, which has been brought to your notice, and is described in Complainant's Exhibit A, differs from any other design.

A. Yes, sir ; I can say about it this : I can see it differs just as much from any other design as a design that is a design differs from any other design in the designing.

Cross-q. 16. Has not every design, peculiar elements or characteristics by which it is distinguished from all others ?

A. I should say it had.

Cross-q. 17. What are the peculiar elements or characteristics which distinguish this particular design, described in Complainant's Exhibit A, from all others ?

A. The same as all other patented designs differ from other designs.

29 Cross-q. 18. If you were to describe the design contained in Complainant's Exhibit A, how would you do so to a person who had never seen it ?

A. I shouldn't describe it. I should take a pencil and make on a piece of paper as best I could. I couldn't describe it by words.

Cross-q. 19. Please take a piece of paper and describe it with a pencil, as near as you can.

(The witness appends his drawing, Complainant's Exhibit L, and further states :)

With this drawing the explanation I could give a man would describe the goods.

Cross-q. 20. Please give the explanation to which you refer.

A. I can tell a man engaged in my business thus: I should say, "This is the Cottage pattern I have to sell ;" not having a specimen with me, I should make this drawing on a piece of paper, and explain it so that they would probably understand it; thus, I should say, "There is the outline of the handle, and those are dots on the handle (witness points to dots A A' A" A,"') which represents raised metal. The lines B B' represents threads of raised metal. The wide and also the narrow part of the handle is of a rounded or oval surface."

Cross-q. 21. Is this as full and minute an explanation as you can give of the Cottage design ?

A. Yes.

Redirect :

R.'d. q. 22. This explanation, in your judgment, would convey to a person in the trade, a correct knowledge of the so-called Cottage pattern, would it not ?

A. As correct as any explanation could be from as rough a sketch, but it would be sufficient for any man engaged in the business—any dealer. More particularly plain to a manufacturer.

E. W. SPERRY.

Subscribed and sworn to before me this 1st day of Dec'r, 1869.

JOHN A. SHIELDS,
Examiner, &c.

30 MARTIN S. SMITH, being called as a witness for the complainant, and being duly sworn, deposes as follows:

Q. 1. What is your name, age, residence, and occupation?

A. Martin S. Smith; my age is thirty-four; I reside in Detroit, Michigan, and am a jeweller; not a practical jeweller—a merchant jeweller.

Q. 2. Do you deal in forks and spoons; and if so, how long have you dealt in them?

A. Yes, sir; for ten years.

Q. 3. Are you acquainted with, and have you dealt in the Gorham Cottage pattern; and if so, how long, and how largely?

A. I think that I gave Mr. Adams, of the Gorham Manufacturing Company, an order for it, among the first that were given. I think so. I have dealt with him ever since, I couldn't say how largely; it has been one of the most popular of my patterns, and I have sold very nearly as much of it as of any other pattern of silver.

Q. 4. Have you read the letters-patent, Complainant's Exhibit A?

A. I have, sir.

Q. 5. Look at Complainant's Exhibits C, D, E, and F, and state whether, in your judgment, their pattern is substantially like or substantially unlike the design in Complainant's Exhibit A.

A. In my judgment, if this pattern were made in silver and placed in another store, that seven out of ten of the customers who buy silverware would consider it the same pattern as the Cottage pattern, provided the patterns were in different stores.

Cross-examined:

Q. 6. From whom have you procured the spoons or other articles containing the Cottage pattern, which you say you have sold, since its first appearance, in considerable quantities?

A. From the Gorham Manufacturing Company, or their predecessors.

31 Cross-q. 7. What do you consider the design described in Complainant's Exhibit A, to consist of?

A. Not being a practical manufacturer or dealer, I don't think I can answer that.

Cross-q. 8. Please to state what makes it a popular pattern, as near as you can.

A. Well, its general outlines and gracefulness of its design—it being plain and neat.

Cross-q. 9. You have seen the design, have you not?

A. Certainly.

Cross-q. 10. Does every design have peculiar elements or characteristics which distinguish it from others?

A. As far as I have seen them, they do. I think there are no patterns, with the exception of one, an old one; if I understand the question right, you ask if patterns of silverware have any difference in pattern.

Cross-q. 11. Do designs for silver-ware possess peculiar characteristics by which they may be distinguished from each other?

A. Yes, sir; they do.

Cross-q. 12. What are the peculiar characteristics of the design described in Complainant's Exhibit A, which distinguish it from all others?

A. I cannot tell you that; but I have never seen anything in solid silver like it.

Cross-q. 13. Have you ever seen anything unlike it?

A. I have; a great many.

Cross-q. 14. Name one.

A. An Ivy pattern, made by Hebbard & Co.

Cross-q. 15. What was the difference between this design and the ivy pattern?

A. Not being a practical workman, I cannot answer such questions.

Cross-q. 16. Then you do not know how to describe this design contained in Complainant's Exhibit A, do you?

A. Not practically.

Cross-q. 17. How can you describe it, if not practically?

A. I can't describe it.

32 Redirect:

R'd. q. 18. Will you look at Complainant's Exhibit M, and state whether or not that is the Ivy pattern mentioned in your cross-examination?

A. It is.

Re-cross:

R. cross-q. 19. Look at Complainant's Exhibit M, and Complainant's Exhibits H, I, J, and K, and state, if you can, the difference between them as respecting the design.

A. The shape and figure of the handle are entirely different, in my opinion. That is all I have to say.

MARTIN S. SMITH.

Subscribed and sworn to before me this 1st day of December, 1869.

JOHN A. SHIELDS,
Examiner, &c.

Newell Matson, being called as a witness for the complainant, and being duly sworn, deposes as follows:

Q. 1. What is your name, age, residence, and occupation?

A. Newell Matson; my age is fifty-three; residence Milwaukee, Wis., and occupation jewelry business.

Q. 2. Where do you carry on your jewelry business, and how long have you been in it?

A. In Milwaukee and Chicago; I can't tell how long exactly; for twenty years, at least.

Q. 3. Are you acquainted with the Gorham Company's Cottage pattern, and how largely have you dealt in it?

A. I am; it has been my principal pattern since they commenced making it; I cannot say when that was, but we got it very soon after they commenced making it.

Q. 4. Will you look at Complainant's Exhibits C, D, E, and F, and compare them with Complainant's Exhibit H, and state whether, in your opinion, they are substantially alike, or substantially different?

33 A. They are substantially different.

Q. 5. State whether or not, in your judgment, ordinary purchasers of silver-ware, seeing them apart, would be apt to mistake one for the other?

A. I think they would.

Q. 6. If the pattern of Complainants' Exhibit H had acquired popularity and reputation in the market, would a design like those of Complainants' Exhibits C, D, E, and F derive an advantage in the market from that fact?

A. I think it would.

Cross-examination waived.

NEWELL MATSON.

Subscribed and sworn to before me this 1st day of December, 1869.

JOHN A. SHIELDS,
Examiner, &c.

THEODORE B. STARR, being called as a witness on behalf of the complainant, and being duly sworn, deposes as follows:

Q. 1. What is your name, age, residence, and occupation?

A. Theodore B. Starr. My age is thirty-two; reside at 114 Congress street, Brooklyn; am a jeweller.

Q. 2. What is the name of your firm, and how long have you been in business?

A. Starr & Marcus. Eight years next February.

Q. 3. Are you acquainted with the Gorham Manufacturing Company's Cottage pattern, marked Complainant's Exhibit K; and, if so, how long?

A. I have been acquainted with it for the last five years.

Q. 4. How largely has your firm sold forks and spoons of the Cottage pattern as compared with the sale of forks and spoons of other patterns?

A. I should judge that we should sell of this pattern about double the amount of any other one pattern.

34 Q. 5. What is your opinion, as a person acquainted with the designs for spoons and forks, of the merit and beauty of the Cottage pattern?

A. I consider it the best pattern made at the present day.

Q. 6. What is its general reputation among buyers and sellers in these particulars?

A. I think my opinion would be endorsed by both the trade and private purchasers.

Q. 7. What do you say as to the saleability of an imitation of this design sufficiently good to deceive ordinary purchasers?

A. I think the sale would be very large, and few persons would discriminate.

Q. 8. Will you compare the design of Complainant's Exhibits C, D, E, and F with that of Complainant's Exhibit K, and state whether or not, in your judgment, they are substantially alike or substantially unlike?

A. The essential features I consider the same.

Q. 9. State whether or not, in your opinion, the resemblance is such as would mislead ordinary purchasers.

A. I think it would.

Q. 10. What is the value of a successful and popular design for forks and spoons, to the house entitled exclusively to use it?

A. I should value the Cottage pattern, if exclusively my own, at fifty thousand dollars.

Q. 11. What effect upon the success of business of making and selling spoons and forks has the merit or demerit of the pattern?

A. Next to the influence of the salesman, it is the most important feature.

Q. 12. If a popular and successful pattern of silver be imitated in base metal, what effect has the imitation on the sale of the silver goods?

A. The imitation not only disparages the sale with private parties, but the trade look upon the pattern as of little value, considering the deception which can easily be practiced on unsuspecting parties.

35 Q. 13. Judging from your experience, what proportion of the designs prepared for forks and spoons achieve a substantial success in the market?

A. About one in forty.

Cross-examined:

Cross-q. 14. Do you manufacture articles containing the Cottage pattern or design, as described in Complainants' Exhibit A, yourselves?

A. We do not.

Cross-q. 15. From whom do you procure them?

A. From the Gorham Manufacturing Co.

Cross-q. 16. You say that the essential features of the design represented in Complainants' Exhibit K are the same substantially as those represented in Complainants' Exhibit C, D, E, and F. Please look at Complainants' Exhibit K, and state what are the essential features of the design represented therein.

A. I don't know how I could describe it in words.

Cross-q. 17. How can you describe it?

A. The only clear way to describe it is by a sketch.

Cross-q. 18. Will you please describe it by a sketch?

A. I am unable to make a sketch.

Cross-q. 19. Do you mean to say that you could not in language cause another person to understand what are the essential features contained in Exhibit K?

A. I do.

THEO. B. STARR.

Subscribed and sworn to before me this 1st day of December, 1869.

JOHN A. SHIELDS,
Examiner, &c.

Adjourned till Dec. 2, 1869, at 10 a. m.

36 NEW YORK, *December 2d*, 1869—10 *a. m.*

Present, counsel as before.

Cross-examination of Charles T. Cook resumed.

Answer to cross-q. 24 continued.

A. It is not customary to either buy or sell from description; I do not feel capable of making or giving a description; well, there is very little more to describe, excepting the threads on the front of the shank, or front side of the spoon, more properly; the threads lose themselves in the bowl; the threads on the back of the shank terminate at the heel, which, with the centre, form a piece of ornament. That is about all I can say.

Cross-q. 25. Do you observe proceeding from the heel toward the tip of the spoon more than one thread on either side of the shank?

A. Those threads may be defined as either one thread or two.

Cross-q. 26. Are there not two distinct lines of raised metal on either side of the shank?

A. Yes.

Cross-q. 27. Are there not also two distinct lines or threads proceeding the whole distance, from the tip of the spoon to the shoulder on either side?

A. Yes.

Cross-q. 28. Do you observe any peculiarity of the flat surface of the spoon between these lines or threads?

A. Only in the outline in the spoon. The oval surface to which you call my attention, is common to a great many spoons, and cannot be called a peculiarity; at least I do not consider it so.

Cross-q. 28. Do you mean to say that you have seen this oval surface on other spoons?

A. Never precisely the same, because the pattern would prevent that.

Cross-q. 29. How would it differ?

37 A. That raising in the centre is, to me, merely a mark of excellence in proportion for the strength of the spoon. It has been done merely to give a thick shank, in order to have strength in the shank, and gradually loses itself in the tip of the spoon.

Cross-q. 30. Are you familiar with any variety of what are known as Ivy patterns?

A. I am not familiar with any pattern known to the general trade as an Ivy pattern.

Cross-q. 31. Do you manufacture any Ivy pattern?

A. Not as yet; we are preparing one.

Cross-q. 33. Why do you call it the Ivy pattern?

A. It has an ivy leaf on it. I don't know that we shall call it an Ivy pattern. We may simply number it.

Cross-q. 33. Why is the spoon, Complainant's Exhibit I, called the Cottage pattern, if you know?

A. I presume it is a mere matter of convenience with the manufacturers to designate it from other patterns.

Cross-q. 34. Can you mention any other peculiarity of the Cottage pattern, as described in Complainant's Exhibit A, than those you have already described?

A. The outline of this spoon is entirely different from any other I know of, or can think of, at all events. Of course I am speaking of a silver spoon, because the one shown me the other evening was just like it.

Cross-q. 35. Look at Complainant's Exhibit G, and Complainant's Exhibit I, and say if the outline of those two exhibits are or are not the same?

A. They are not the same.

Cross-q. 36. Is there any other peculiarity of the Cottage pattern, as described in Complainant's Exhibit A, which you can mention?

. No, sir; I can think of nothing.

C. T. COOK.

Subscribed and sworn to before me, the 2d Dec., 1869.

JOHN A. SHIELDS,
Examiner, &c.

38 Edward V. Haughwout, being called as a witness for the complainant, and being duly sworn, deposes as follows:

Q. 1. What is your name, age, residence, and occupation?

A. Edward V. Haughwout; I am fifty-seven; reside at 100 East Nineteenth street; and am a merchant.

Q. 2. In what branch of merchandise are you engaged, and how long have you been so engaged?

A. I am engaged in general house-furnishing business; China, glass, and plated goods, silver-ware, and general fancy-goods, and have been so engaged for about thirty-seven years; in the manufacture of forks and spoons for some twenty-five to thirty years.

Q. 3. Have you ever been engaged in the manufacture of forks and spoons; and if so, how long?

A. Only in the process of plating, for about fifteen years.

Q. 4. Will you please compare Complainant's Exhibit C, D, E, and F, and state whether, in your judgment, the designs of the first-named exhibits are substantially like or substantially unlike the design of the last-named exhibit?

A. I should call the designs very similar.

Q. 5. State whether or not, in your judgment, the similarity of the designs is such as to mislead ordinary purchasers.

A. I should think they are.

Q. 6. What can you say in regard to the importance of the merit and beauty of designs in forks and spoons, as bearing on the business of selling them?

A. I consider the character of designs as a very important matter in the selling of goods. Not only in forks, but in all goods. I consider the attempts that are made to copy patented articles that have real merit as being very injurious to the general trade. It acts as a great discouragement to those that have talent to get up new things, when others are allowed to copy them.

Q. 7. What effect on the market for silver goods of any given pattern does its imitation in base metal have?

39 A. It has a very injurious effect on the sale of the silver goods, because persons will not buy silver articles, generally, when they know that they are made up in common metals of the same or similar designs.

Q. 8. What is the general reputation of the Gorham Cottage pattern?

A. Very good, sir; a very saleable pattern.

Cross-examined:

Cross-q. 9. Do you plate spoons and forks, and other articles containing the design represented in Complainant's Exhibit H?

A. No, sir. We have never plated any of that pattern.

Cross-q. 10. Have you ever sold any?

A. We have never had any plated goods of the Gorham pattern, as represented in Complainant's Exhibit H.

Cross-q. 11. Have you ever sold any containing this design which were of solid silver?

A. We have, sir. It is one of regular patterns.

Cross-q. 12. When did you first commence, as near as you recollect?

A. I think it is aboout two years, but I am entirely uncertain about that.

Cross-q. 13. Have you been engaged in this sale ever since you commenced?

A. I think we have them now, and I think we have had them ever since. I am not very much in this department myself.

Cross-q. 14. From whom have you procured these articles?

A. The Gorham Manufacturing Company.

Cross-q. 15. Do you purchase them outright, or sell on commission?

A. Purchase them outright.

Cross-q. 16. What are the principal features of the design represented in Complainant's Exhibit H?

A. It is what we call a neat and graceful pattern.

40 Cross-q. 17. Would every neat and graceful pattern be, in your opinion, similar to this?

A. No, sir. There might be other neat and graceful patterns beside this. There are.

Cross-q. 18. What, in your opinion, are the elements or features which make up the neatness and grace of this design. Name any that you are able.

There is not much to say upon this subject. It is easily kept clean is perhaps one thing, being plain. I don't know that there is anything else necessary to say.

Cross-q. 19. This design is known as the Cottage pattern, is it not?

A. Yes.

Cross-q. 20. Please describe, with the Complainant's Exhibit H before you, as intelligibly as you are able, what constitutes the Cottage pattern, by which it is distinguished from other patterns?

A. I don't know what induced these gentlemen to give it this name. Well, sir, I should call it a neat, plain pattern, with corded edge.

Cross-q. 21. You have described the edge. Will you describe any other part?

A. The prong portion of the fork is similar to other patterns, and looks much the same as other forks. I may say that I have already described the handle as a neat, plain pattern, with corded edge.

Cross-q. 22. Do you observe no peculiarity in that part of the handle where it commences to widen, which distinguishes it from other designs?

A. It is different from others. There are a hundred patterns; and if you will show me one other, I will be happy to describe the difference.

Cross-q. 23. What is the difference between the design represented in Complainant's Exhibit H and Complainant's Exhibit G?

A. The form of Complainant's Exhibit G, at this point, is wider, and more, I may say, of an "O. G." form, and the end of the handle is also wider, and the ornamentation somewhat varied, and the open space not quite so much raised as Complainant's Exhibit H.

41 Cross-q. 23. Is the handle of Complainant's Exhibit G, where it commences to widen, thicker in the centre than at the edge?

A. I should think not. It seems to me to be struck up from the same thickness of metal.

Cross-q. 24. What constitutes the value of this Cottage pattern?

A. It was generally admired, and has sold well.

Cross-q. 25. Do you observe, in Complainant's Exhibits C, D, E, and F, between the heel and where the spoon commences to widen, one or two beads on either edge?

A. One on each edge.

Cross-q. 26. How many do you observe on each edge of Complainant's Exhibit H?

A. There are two.

Redirect:

Redirect q. 27. Are the differences which you have observed between Complainant's Exhibit G and the Cottage pattern sufficient, in your judgment, to prevent Complainant's Exhibit G from being an imitation of the Cottage pattern?

A. I consider it (Complainant's Exhibit G) an imitation, but not a very close one.

E. V. HAUGHWOUT.

Subscribed and sworn to before me, this 2d day of December, 1869.

JOHN A. SHIELDS,
Examiner, &c.

Henry H. Hayden, being called as a witness for the complainant, and being duly sworn, deposes as follows:

Q. 1. What is your name, age, residence, and occupation?

A. Henry H. Hayden; I am forty-nine; reside in New York City; and am engaged in manufacturing and selling metal goods.

42 Q. 2. Have you had any experience in manufacturing and selling forks and spoons; and if so, how long?

A. I have, for about four years, in manufacturing, and have been familiar with the business for some fifteen years.

Q. 3. Will you look at Complainant's Exhibits C, D, E, and F, and compare them with Complainant's Exhibit H, and state whether or not, in your opinion, the pattern in the first-named exhibits is substantially like or substantially unlike the pattern in Complainant's Exhibit H?

A. It is substantially like.

Q. 4. State whether or not, in your judgment, the resemblance between them is such as would be apt to mislead ordinary customers?

A. In my opinion, it would mislead, and would be considered one and the same pattern by the trade; by the trade I mean customers as well as manufacturers.

Q. 5. State what is the general reputation of the Gorham Cottage pattern for saleability and for adaptation to the market.

A. It is considered a very desirable pattern, and very saleable.

Q. 6. What do you consider to be the importance of designs in the business of making and selling forks and spoons?

A. I consider the pattern an all-important matter; that an undesirable pattern, with the same material and labor, is almost impossible for sale at a reduced price, while a desirable pattern finds a ready sale even at a profit.

Q. 7. What effect, in your judgment, would such an imitation of the Cottage pattern as that embodied in Complainant's Exhibits C, D, E, and F, be likely to have upon the market for the Gorham Cottage pattern?

A. It would depend upon circumstances. If an inferior article was made in this particular business, it would be likely to destroy the sale of the better original article; but if of an equal quality, the damage, although quite important, would not be so great.

43 Q. 8. Suppose the Gorham Cottage pattern to be used by its owners on silver goods only, and an imitation, like the imitation in Complainant's Exhibits C, D, E, and F, to be put upon the goods of base metal, how would that affect the sale of the Gorham Cottage pattern goods?

(Objected to as assuming that Complainant's Exhibits C, D, E, and F, are an imitation of the Gorham Cottage pattern.)

A. It would injure the sale.

Q. 9. What are the advantages derived from the exclusive ownership of a desirable pattern for forks and spoons?

A. The exclusive ownership enables him to make larger sales, adds to his reputation as a manufacturer, and is of value in enabling him to increase his sales of other patterns.

Q. 10. Did Holmes, Booth & Haydens ever seek to acquire the right to use the Gorham Cottage pattern; and if so, how often?

A. I know nothing of that except what my brother, who is associated with me in business, informed me, namely, that he had requested of the Gorham Manufacturing Company permission to make that pattern upon our paying them a royalty.

(The defendants' counsel objects to that part of the foregoing answer which follows the word "namely," as hearsay.)

Cross-examined:

Cross-q. 11. Have you ever made or sold articles, either plated or solid, containing what you style the Gorham Cottage pattern, and which is described in Complainant's Exhibit A?

A. Not to my knowledge.

Look at Complainant's Exhibits C, D, E, and F, G, and H, I, J, and K, and state if you observe any differences between them with regard to the pattern or design.

44 A. I do.

Cross-q. 12. What are they?

A. In all of them there is a difference in the ornamentation of the stem; that is, I don't mean to say all of them, but Complainant's Exhibits H, I, J, and K differ, in what I should call the stem. I can describe it more definitely by saying from the bowl two-thirds up the handle, where it terminates with a dot, about two-thirds the way up the handle, from the bowl.

Cross-q. 13. What is the difference to which you refer?

A. In Exhibits H, I, J, and K there is two more lines or threads than in the other exhibits, C, D, E, F, and G.

Cross-q. 14. Do you observe any other difference than that you have mentioned?

A. There is a difference in the ornamentation in the upper end of the handle, and in F and G, a little difference in the outline of the upper part of the handle. In all other respects I should consider them a close imitation of H, I, J, and K, and the difference in the outline of the handle appears more plainly in G than in F. There is a slight difference here in the termination, at the lower end of the handle—a slight difference in the ornamentation at the heel of the handle; otherwise they would pass for one and the same pattern.

Cross-q. 15. Do you observe any other difference?

A. No other material difference. I consider myself an expert, and can detect very slight differences, which persons in the trade ordinarily would not, and I consider the whole exhibits (C, D, E, and F, G, H, I, J, and K,) one and the same pattern, and believe the trade generally would so consider them.

Cross-q. 16. Mention the differences which you, as an expert, are enabled to detect in the design?

A. There is quite a difference. There is a difference in Complainant's Exhibits C, D, E, and F, and G, which is more easy for an expert or one very familiar with the goods to detect than describe. I don't know that I could point out particularly any very important differences, except that the general character of the work in Complainant's
45 Exhibits C, D, E, F, and G is inferior to that in Complainant's
Exhibits H, I, J, and K.

Cross-q. 17. Do you consider the outline of Complainant's Exhibit G is substantially the same as the outline of the Complainant's Exhibit H?

A. There is more difference between G and H than in any of the other exhibits, as I have before stated. I consider them sufficiently alike to be considered one and the same pattern.

Cross-q. 18. You say that Complainant's Exhibit G has two lines or beads running up each side of the handle, from the heel to the shoulder. If there were three lines on each side, should you consider the design of Complainant's Exhibit B, substantially the same as the design of complainant's Exhibit H?

A. It would not materially alter it, in its classification of being the same pattern. We frequently, in the manufacture of our patterns, change them somewhat in ornamentation and outline, which improves the desirableness of the pattern without changing its name or pattern, as known to the trade. It is considered one and tho same pattern afterwards; it is improved, but remains the same pattern. While other alterations might be made, no greater, that would entirely or so greatly change its general appearance as to call for a new name and necessitate its being designated as a new pattern.

H. H. HAYDEN.

Sworn to before me this 2d day of December, 1869.

JOHN A. SHIELDS,
Examiner, &c.

JOHN GLEAVE, being called as a witness for the complainant, and being duly sworn, testifies as follows:

Q. 1. What is your name, age, residence, and occupation?

A. John Gleave; I am fifty-nine; reside at 33 Carmine street, and do business as a die-sinker at 127 Elm street, New York.

46 Q. 2. How long have you been a die-sinker, and in what especial branch of the business have you been principally engaged?

A. I've been in it about thirty to forty years; for silversmith's, chiefly.

Q. 3. How large has been your experience in making dies for forks and spoons?

A. About twenty-three or four years; that is inside.

Q. 4. Have you cut dies for forks and spoons for any particular house, or for the trade generally?

A. For the trade generally.

Q. 5. Will you compare the design of Complainant's Exhibits C, D, E and F, with the design of Complainant's Exhibit H, and state whether, in your judgment, the two designs are substantially alike or substantially different?

A. I should say in the main that they are alike.

Q. 6. State whether or not, in your judgment, they are sufficiently alike to mislead ordinary purchasers as to their identity?

A. I should say they were. On a second examination, they would not.

Q. 7. If an ordinary purchaser had not a sample of the pattern of Complainant's Exhibit H with him, would he or not, in your judgment, be apt to consider Complainant's Exhibit C to be the same pattern as Complainant's Exhibit H?

A. I should say he would.

Q. 8. From your experience as a die-sinker, what proportion of the designs for forks and spoons, which are put upon the market, have achieved a permanent and substantial success in the market?

A. I am a die-sinker, and not a salesman, and so can only judge from my own experience, and should say that not above one in a dozen makes a good paying pattern.

Cross-examined:

Cross-q. 9. Have you been engaged strictly in the business of die-sinking during the time which you mentioned?

47 A. Yes. I have always carried the business on for the last twenty-three or four years.

Cross-q. 10. Has it been your business to purchase or sell silver or other ware containing designs, as an ordinary dealer in such goods?

A. No, sir.

JOHN GLEAVE.

Subscribed and sworn to before me, Dec. 2d, 1869.

JOHN A. SHIELDS,
Examiner, &c.

GEORGE B. TOBEY, being called as a witness for the complainant, and being duly sworn, deposes as follows:

Q. 1. What is your name, age, residence, and occupation?

A. George B. Tobey; my age is twenty-seven; I reside in Brooklyn, and am a travelling salesman for the Gorham Manufacturing Company.

Q. 2. How long have you been in your present business?

A. Since July 20th, 1869.

Q. 3. Where have you travelled for your present employers?

A. Through the States of New York, Ohio, Michigan, Indiana, and Pennsylvania, comprising thirty-six cities and towns.

Q. 4. When you have offered for sale spoons and forks of the Gorham Cottage pattern, has anything been said to you about an imitation of that pattern; and if so, what?

A. Mr. C. C. Shaver, of Utica, N. Y., says, in taking the Cottage pattern from my case of samples, "It's no use for me to keep this pattern in silver, while I can buy it so much cheaper in plate;" and he did not buy that pattern; and Julius Walker, of Buffalo, N. Y., made about the same reply to my remark that that was a saleable pattern. Those two instances I remember distinctly, while the trade generally, in those places that I have mentioned, pointing to the Cottage pattern among my samples, said, "That pattern is copied in plate, and it is a shame that your company cannot have the benefit of their own brains and labor."

48 Q. 5. During your journey in the West, did you see any of the plate goods said to imitate the Cottage pattern?

A. I did, in nearly every store I visited.

Q. 6. Will you look at Complainant's Exhibits C, D, E, and F, and state whether you recognize any of them as being of the same pattern as the plate goods mentioned in the preceding question?

A. I do not.

Q. 7. Will you look at Complainant's Exhibit G, and state whether, or not, that was the pattern of these plate goods?

A. It is. At the same time parties remarked that there has been a more complete copy in the market than this one, Complainant's Exhibit G.

Q. 8. How long have you been in the business of selling forks and spoons?

A. Since being in the employ of the Gorham Manufacturing Company.

(Complainant's counsel objected in season to the answers contained in this, the above deposition, which contain hearsay evidence, and to the questions calling for the same.)

Cross-examined:

Cross-q. 9. Does your whole business consist of traveling for the Gorham Manufacturing Company?

A. It does.

GEORGE B. TOBEY.

Subscribed and sworn to before me, this Dec. 2d, 1869.

JOHN A. SHIELDS,
Examiner, &c.

Adjourned for new notice.

49 THE GORHAM MANUFACTURING COMPANY
vs.
GEORGE C. WHITE.

JANUARY 11, 1870.

Testimony taken on behalf of the complainants.

Present, counsel for complainants, Charles F. Blake, esq.; counsel for defendant, W. C. Witter, esq.

ALFRED BRABROOK, being called as a witness on the part of the complainants, and being duly sworn, deposes and says as follows:

Q. 1. What is your name, age, residence, and occupation?

A. My name is Alfred Brabrook; my age is 56; I reside at Taunton, Mass.; I am agent for the firm of Reed & Barton. They are manufacturers of Britannia metal and German-silver plated ware, both plated and unplated.

Q. 2. How long have you been connected with the business of manufacturing Britannia metal and German-silver plated ware?

A. I have been there since 1837, with very little interruption.

Q. 3. Have you had any experience in selling plated forks and spoons, and if yea, how long?

A. I have; perhaps from five to seven years.

Q. 4. Are Reed & Barton largely engaged in the manufacture of plated forks and spoons; and if yea, how long have they been so engaged?

A. Well, they might not be considered very large manufacturers, though that is a branch of their business; not the largest.

50 Q. 5. Have you in your business been accustomed to see and examine many different patterns of forks and spoons?

A. Well, I think I have seen different patterns of forks and spoons, though not quite as much as some others perhaps.

Q. 6. Will you look at Exhibits C, D, E, & F, and compare their patterns with the patterns of H and K, and state whether their patterns are not substantially alike or substantially unlike?

A. I should presume the specimen E and C, and also the specimens D and F, as evidently intended to imitate substantially the patterns of Exhibits H *are* K.

Q. 7. State whether or not, in your opinion, the resemblance between these patterns is such as would be apt to mislead ordinary purchasers?

A. Well, I have no doubt it would in many cases.

Q. 8. State what, in your judgment, would be the effect upon the market for goods of the pattern of Exhibits H and K, that there was on sale such an imitation of it as that shewn in Exhibits C, D, E, and F.

A. Well, I should suppose the tendency would be to diminish the demand for H and K.

Q. 9. What is the value or importance to a manufacturer of forks and spoons of a pattern which has become known and approved in the market?

A. The general value is important from the fact that so long as a pattern is approved in the market there is not the necessity of getting up a new pattern—that commanding a good sale. We all know that these patterns are brought out at great expense?

Q. 10. What proportion of patterns for forks and spoons put upon the market are substantially successful in a business point of view?

A. That, perhaps, may admit of a good deal of qualification. There may, perhaps, be one in three comparitively successful, but probably not more than one to from six to twelve that would be decidedly successful.

51 Cross-examined:

Cross 11. Do Reed & Barton manufacture all the goods you sell in this particular line?

A. I am not aware that they buy anything they sell, except probably in a few instances we have imported a few of the parts of castors, or some other articles. I am not aware that we have imported anything entirely finished. In some cases we may buy for a special order.

Cross 12. Where is their manufactory located?

A. In Taunton, Mass.

Cross 13. Where is your agency located?

A. I suppose I should be considered a general agent. We have a sample store-room in this city, No. 2 Maiden Lane.

Cross 14. Have you ever been agent for any other company than Reed & Barton?

A. I have not.

Cross 15. Please look at Exhibit H, and state what you think that pattern consists of, as distinguishing it from other patterns?

A. I suppose the peculiarity is from other paterns in the form and figure of what would be called the handle part of the fork.

Cross-q. 16. Would you mean by what you include in form and figure, the outline of the handle?

A. I mean by that the outline, combination, and general result of it.

Cross-q. 17. Combination of what?

A. What I mean by combination is the general effect produced by a straight figure, and then a break off, as we would say. Perhaps one of the most striking features of this is the general appearance and figure of the handle from the shoulder to the tip, presenting an oval appearance. In general effect, should include the quirl at the shoulder. I do not mean to say that the part below the shoulder is not new.

Cross-q. 18. Do you consider the increased thickness of the spoon handle at and for a short distance above the shoulder, a prominent feature in this pattern, Exhibit H?

52 A. I do not attach much importance to the fact whether it is raised or a little more flattened.

Cross-q. 19. Then you would not consider this an essential feature in this pattern?

A. I think I should not say it was an essential feature in the sense in which we understand the term, but I think it is the better for being raised.

Cross-q. 20. Why?

A. Perhaps not so much better as regards its use, but it gives it a little better appearance by being raised.

Cross-q. 21. Look at the model, Exhibit H, and state how many raised lines or beads you observe on the handle of the same from the shoulder down to the shank of the said model?

A. There seem to be four—two on each side, not including the centre.

Cross-q. 22. Look at spoon, Exhibit E, and say how many raised lines or beads you observe between the shank and the shoulder?

A. Two.

Cross-q. 23. Do you observe in Exhibit E any such raised portion proceeding from the shoulder toward the tip of the spoon, as you have described in Exhibit H?

A. Well, in Exhibit E it is evidently not raised as much. I think it is raised a trifle.

Cross-q. 24. Is, in your opinion, the centre of the model, Exhibit E, at the shoulder thicker than at the edges?

A. Well, I should think perhaps not, but the head itself is raised, and the centre of the plain part is raised a little, I should think.

Cross-q. 25. Do you consider the outline of Exhibit F substantially the same as the outline of Exhibit E?

A. I consider the outline of the two quite similar. The general appearance is quite similar. Exhibit F is drawn in a little, so that it does not exhibit the same oval, but I think they have a striking similarity.

Cross-q. 26. Did you not observe that difference when Exhibits C, D, E, and F were brought to your attention?

A. I have observed this difference.

53 Cross-q. 27. Look at the tip of Exhibit E and Exhibit H, and say if you think a shield is substantially similar to a rib or point?

A. If you confine it to that point, I don't think there is striking similarity.

Cross-q. 28. Do the two quirls, as you call them, in Exhibit E, proceed from the outside edge or bead?

A. They do not appear to.

Cross-q. 29. Please answer question 28 with reference to Exhibit H?

A. It appears to me in this case as well, it does not proceed from the outside edge. One quirl turns in, and the other turns out.

Cross-q. 30. Does not the outside edge or bead in Exhibit E extend continuously around the handle of the spoon?

A. I should think it did.

Cross-q. 31. Is that true of Exhibit H?

A. It is not.

Cross-q. 32. How many beads or raised lines do you observe in Exhibit E near the tip of the handle, commencing at about its widest part?

A. Two, part of the way; and three the rest of the way.

Cross-q. 33. Please answer question 32 with reference to Exhibit H?

A. Two only.

ALFRED BRABROOK.

Subscribed and sworn to before me 11th day of January, 1870.

JOHN A. SHIELDS.
Examiner, &c.

Reuben R. Haskell, being called as a witness on the part of the complainant, and being duly sworn, deposes and says as follows:

Q. 1. What is your name, age, residence, and occupation?

A. My name is Reuben R. Haskell; I am 29 years old; I reside at 26 Perry street; I am in the employ of the Gorham Manufacturing Company, No. 3 Maiden Lane.

54 Have you recently travelled through the West; and if yea, what places have you visited?

A. Yes, sir; Pittsburg, Cincinnati, St. Louis, Louisville, Indianapolis, Chicago, Milwaukee, St. Joseph, Kansas City, Leavenworth, Omaha, Des Moines, Davenport, Burlington, Keokuk, Peoria, Bloomington, Springfield, Jacksonville, Dayton, Memphis, Nashville, Lexington, and New Orleans.

Q. 3. Will you look at Exhibits D and G, and state whether, during your journey, you saw such goods on sale, and how often?

A. I did; I saw either one or the other everywhere, and particularly that Exhibit G; and I saw D in numerous other places.

Q. 4. Are you acquainted with the patterns of forks and spoons known as the Cottage pattern, of Gorham Manufacturing Company?

A. Yes, sir.

Q. 5. State whether or not you in your journey mistook any forks and spoons for the Cottage pattern; if so, state what forks and spoons they were, and narrate the circumstances?

A. I did; I was in the store of W. and M. and J. B. Mayo, in Chicago, and looking in their cases of silver, where silver-ware is kept, I saw a pattern like Exhibit D, and supposed it was our own Cottage pattern. I remarked to him that he had a good stock of our Cottage pattern; he smiled and told me I had better look again; and it was only after taking my second look that I discovered my mistake.

Cross-examined:

Cross-q. 6. Do you mean to say that you saw goods like Exhibit D in every one of the places you have enumerated?

A. No, sir; only in part of them.

Cross-q. 7. In which ones?

A. The only one that I remember particularly was Chicago.

55 Cross-q. 8. At whose house in Chicago?

A. At W. M. and J. B. Mayo's.

Cross-q. 9. What differences do you observe in Exhibits E and F, if any, as regards outline?

A. I notice a difference in the top of the handle; one curve is sharper than the other.

Cross-q. 10. Do you notice the same difference between Exhibits H and F, or not?

A. I do.

Cross-q. 11. Is that difference much more marked between E and G, or not?

A. It is.

Cross-q. 12. Look at Exhibit E, and tell me if you notice any peculiarity at the point in the handle, where the shoulders are formed; if so, state what it is.

A. No, sir; I do not.

Cross-q. 13. Look at Exhibit H, at the same point, and see if you observe any peculiarity in that; and if so, what?

A. I don't see any.

Cross-q. 14. Do you not observe that the metal is raised at that point, in the centre of Exhibit H, thus making it thicker at that part?

A. I do.

Cross-q. 15. Look again at Exhibit E, and say if you observe a similar protuberance?

A. It is not as great.

Cross-q. 16. Look at Exhibit G, and say if you observe any protuberance at that point?

A. I do not.

Cross-q. 17. What do you consider the Cottage pattern as you term it, which is represented by Exhibit H, consists of, as distinguishing it from other patterns, with which you may be familiar?

(Objected to, on the ground that the witness is neither called or qualified as an expert.)

A. The principal difference is at the extreme top of the handle.

Cross-q. 18. Difference between what?

A. Between Exhibit H and Exhibit E.

56 Cross-q. 19. What minor difference do you observe?

A. In the outside thread of the spoon, there is a difference in the scroll at the top of the spoon.

RUBEN R. HASKELL.

Subscribed and sworn to before me 11th January, 1870.

JOHN A. SHIELDS,
Examiner, &c.

JAMES H. WHITEHOUSE, being called as a witness, on the part of complainant, and being duly sworn, deposes and says as follows:

Q. 1. What is your name, age, residence, and occupation?

A. My name is James H. Whitehouse; my age is 37; I reside at 79 Ryerson street, Brooklyn; I am a designer.

Q. 2. Are you in the employ of Tiffany & Co.; and if so, how long have you been employed by them?

A. I am in their employ; about 12 years.

Q. 3. Have you yourself designed patterns for forks and spoons?

A. I have.

Q. 4. Will you compare the patterns of Exhibits C, D, E, and F, with the patterns of Exhibits H and I, and state whether or not they are substantially alike or substantially different?

A. They are substantially alike, though under my oath I shall feel inclined to exclude Exhibit F, as being exactly alike, although it was evidently suggested by the Cottage pattern.

Q. 5. State whether or not, in your judgment, the resemblance of C, D, E, and F, to H and I, is such as would be apt to mislead ordinary purchasers?

A. Without doubt it is.

Q. 6. What proportion of the designs for forks and spoons which are put upon the market succeeds?

A. There is not one in twenty that succeeds.

57 Q. 7. From your knowledge and experience in the business, were the designs of C, D, E, and F, original designs, or were they suggested by the designs of Exhibits H and I?

A. They were not original; they were suggested by designs of Exhibits H and I.

Cross-examined :

Cross-q. 8. Please look at Exhibits H and G, and say if they are substantially similar in design ?

A. They are not substantially the same design, but copied from the Cottage pattern.

Cross-q. 9. Why are they not ?

A. With the intention of making Exhibit G less like the Cottage pattern, the artist has caused the top to swell more suddenly.

Cross-q. 10. As a person of experience and an artist in designing, what do you consider the essential features of the Cottage pattern, as represented in Exhibit H ?

A. Well, I should describe that with my pencil.

Cross-q. 11. Does the outline form a part of the design ?

A. It does.

Cross 12. Are the outlines of Exhibit H and Exhibit G substantially the same ?

A. With the exception of the sudden swell I speak of.

Cross-q 13. Are not the outlines of Exhibits H and G so different as to be easily detected by the eye ?

A. When the two spoons are together it would be easy to detect, otherwise it would not be so noticeable—I mean it would not be noticeable.

Cross-q. 15. Do you consider that the increased thickness of the handle of Exhibit H, at a point commencing at and between the shoulders, and extending upward towards the tip of the handle, an essential feature in the design ?

A. It is.

Cross-q. 16. Do you observe that feature in Exhibit G ?

A. Not to the same extent ?

58 Cross-q. 17. Do you observe it at all ?

A. Slightly.

Cross-q. 18. Is Exhibit G any thicker at the point than at the edges ?

A. Yes.

Cross-q. 19. How much ?

A. I could not say without instruments. It gives to the eye the effect of being swelled.

Cross-q. 20. Do you observe any difference in the number or arrangement of threads or beads around the handle of Exhibits H and G ?

A. There is one thread less on each side from the shank to the shoulders; but the same number of threads above.

Cross-q. 21. Do you observe any other difference in the ornamentation of the upper part of the spoon ; if so, what ?

A. The threads rolled down instead of up, and the point is there, but increased in size.

Cross-q. 22. Is not the point also different in shape as well as in size ?

A. The outline of the point is the same.

Cross-q. 23. What name have designers for the point to which you refer, as represented in Exhibit G ?

A. The tip.

Cross-q. 24. Do you see anything at or near the tip of Exhibit G like a shield, or not ?

A. Both assume shield shape.

Cross-q. 25. What do you mean by both ? do you mean Exhibits H and G ?

A. Yes.

Cross-q. 26. How many lines or threads do you observe near the top of Exhibit G, say, commencing at its widest part and extending upwards?

A. Three on each side.

Cross-q. 27. How many on Exhibit F?

A. Two on each side.

Cross-q. 28. Does or does not the outside bead in Exhibit G extend continuously around the handle?

A. It does.

59 Cross-q. 29. Is that true of Exhibit H?

A. No.

Redirect:

R'd. q. 30. Are the differences between these designs of which you have spoken such as would strike an ordinary purchaser who had not the two patterns together to compare them?

A. It would not strike the majority of purchasers.

R'd. q. 31. In looking at the Cottage pattern what is it that first strikes the eye?

A. The scrolls at the shoulders.

R'd. q. 32. Is that practically a characteristic feature of the design?

A. One of the chief features.

(The witness desires to correct his answer to the 4th direct interrogatory, and says: "In place of the Exhibit F I wish to place Exhibit G."

Counsel for complainant here says that Exhibit G had not at that point of the examination been exhibited to the witness.

The witness wishes to state that he had seen it a few minutes before.)

J. H. WHITEHOUSE.

Subscribed and sworn to before me, 11th day of Jan'y, 1870.

JOHN A. SHIELDS,
Examiner, &c.

60 NEW YORK, *January 27th*, 1870—11 *a. m.*

Present: Counsel for both parties.

JAMES P. CHURCH, being called as a witness on behalf of complainants, and being duly sworn, deposes as follows:

Q. 1. What is your name, age, residence and occupation?

A. James P. Church; I am twenty-nine; residence, New York City; and am the New York manager of Hall, Elton & Co.

Q. 2. What is the business of Hall, Elton & Co.; and how long have they been engaged in it?

A. Manufacturers of forks and spoons, and have been engaged in it since 1837.

Q. 3. How large is th*ere* business compared with that of other manufacturers of forks and spoons?

A. It is one of the largest.

Q. 4. How long have you been in the fork and spoon business?

A. About ten years.

Q. 5. Will you look at Complainant's Exhibits C, D, E, and F. Compare their design or pattern with that design or pattern of Complainant's Exhibits H, I, J, and K, and state whether or not the two designs or patterns are substantially alike or substantially unlike?

A. They are substantially alike, although Exhibit F varies more than the others.

Q. 6. State whether or not the resemblance of the two sets of patterns is such as would be apt to mislead an ordinary purchaser?

A. I think it would.

Q. 7. From your experience in the business, state what proportion of new designs for forks and spoons prove to be commercially successful?

A. About one-third.

Cross-examined:

61 Cross-q. 8. In what respect does Complainant's Exhibit F differ more than Complainant's Exhibits C, D, and E from Complainant's Exhibits H, I, J, and K, as you stated in your answer to the fifth interrogatory?

A. It is wider across the end, and narrower near the shoulder.

Cross-q. 9. Do you consider that the outline is one element of the pattern of these exhibits?

A. Certainly.

Cross-q. 10. Look at Complainant's Exhibit G, and say if you consider the outline of that spoon substantially like the outline of Complainant's Exhibit C, D, and E?

A. It is not.

Cross-q. 11. Do you think a purchaser would be led, on seeing Complainant's Exhibit G, to take it for the pattern of Complainant's Exhibit C, D, and E, or not, considering outline and all?

A. I do not think they would be likely to take one for the other.

Cross-q. 12. Look at Exhibits C, D, and E, and state what other elements you consider as entering into their patterns beside the outline?

A. The thread, the ornament at the shoulder and at the tip.

Cross-q. 13. Looking at Complainant's Exhibit C, D, and E, and at Complainant's Exhibit H, I, J, and K, state whether there are the same number of threads extending from the shanks to the shoulders in those two sets of exhibits.

A. There are not.

Cross-q. 14. State also whether the ornaments at the tips of Complainant's Exhibits C, D, and E are like the ornaments at the tips of Complainant's Exhibits H, I, J, and K.

A. They are not exact copies, but have something of the same general character.

62 Cross-q. 15. Look at Complainant's Exhibits H, I, J, and K, and say whether you observe that the articles are thicker, or swelled, at a point between the ornaments at the shoulders, said swelling losing itself in the wider portion of the spoon towards the tip?

A. Certainly.

Cross-q. 16. Do you observe that peculiarity in Complainant's Exhibits C, D, E, and F?

A. Above the ornaments there is not.

Cross-q. 17. Do you observe any in Exhibit C?

A. No.

Cross-q. 18. Do you think that the centre of Complainant's Exhibit G is thicker than the outside beads, in any portion of its length?

A. It is not thicker than the outside edge.

Cross-q. 19. How with reference to Exhibits C, D, E, and F?

A. The same answer applies to Complainant's Exhibits C, D, and F; in Complainant's Exhibit E, I observe a slight swelling above the outside beads.

Cross-q. 20. Near the tip of Complainant's Exhibits C, D, E, F, and G, how many lines, or beads, do you observe, commencing at the widest point of the handles and extending toward the tips?

A. Three on each side.

Cross-q. 21. How many, at the same point, in Complainant's Exhibits H, I, J, and K?

A. Two.

Redirect:

R'd 22. Look at Complainant's Exhibit G, and state whether or not you find in its design the same thought or idea as you find in Complainant's Exhibits H, I, J, and K?

A. It is similar in some points and unlike in others.

R'd. 23. State whether or not this similarity consists in the artistic conception of the pattern, as you understand those words?

63 A. The similarity consists in the design for ornament; the dissimilarity in the shape of the handle. Both form a part of what I call the artistic design.

JAMES P. CHURCH.

Subscribed and sworn to before me this 27th January, 1870.

R. E. STILWELL,
Examiner, &c.

JOSEPH T. BAILEY, being called as a witness on behalf of complainants, and having affirmed in due form of law, deposes, as follows:

Q. 1. What is your name, age, residence, and occupation?

A. Joseph T. Bailey; I am 34 years old; reside in Philadelphia; and am by occupation a jeweller.

Q. 2. What is the name of your house, and how long have you been in business?

A. The name of the firm is Bailey & Co., and it has been in business for some forty years, I believe.

Q. 3. Are you the head of your house?

A. Yes, sir.

Q. 4. Will you look at Complainant's Exhibits C, D, E, F, and G, compare their pattern with the pattern of Complainant's Exhibits H, I, J, and K, and state whether the two patterns are substantially alike or substantially unlike?

A. I don't think that an ordinary observer would notice any difference on a casual observation. But to a person skilled in this business, of course there are some small differences. I mean to say that should an ordinary observer come into my store and take up these two spoons, (Complainant's Exhibit J and E,) he would not notice any difference in them, unless desired to examine them critically. And I further state that in any pattern for spoons, individual spoons may present slight differences on a critical examination.

Q. 5. What proportion of patterns, for forks and spoons, put upon the market, are a substantial commercial success?

A. I should say, perhaps, one in about eighteen or twenty.

64 Q. 6. How would the sale of a pattern of forks and spoons, in silver, be affected by the presence in the market of a good imitation in plated ware?

A. I should think it would very seriously affect the sale of the silver goods of the same pattern. It certainly would in my own case. That is, if I had the two patterns in my own cases, people would not buy so readily a pattern in silver which was copied in plated ware.

Q. 7. What, in you' judgment, is the value to its owner, in the fork and spoon business, of a popular pattern?

A. The sale of a man's goods depends upon his patterns, at the present day particularly.

Q. 8. What can you say in regard to the success of the Cottage pattern of Gorham Manufacturing Company in the market?

A. I believe it to be the most successful plain pattern that has ever been made.

Cross-examined:

Cross-q. 9. Do you sell the Cottage pattern?

A. Yes, sir. I have sold it for some years.

Cross-q. 10. Do you procure the goods of the Gorham Manufacturing Company?

A. Direct, sir.

Cross-q. 11. Have you dealt largely in this pattern?

A. Yes, sir.

Cross-q. 12. How many years have you been connected with the house of Bailey & Company?

A. About 16 years.

Cross-q. 13. About how many years have you sold the Cottage pattern?

A. I should think about four years. I can't state exactly how long.

Cross-q. 14. Is the pattern represented in the Complainant's Exhibits H, I, J, and K, that which you have called the Cottage pattern in your examination?

A. Yes, sir.

65 Cross-q. 15. Do you consider the outline a part of that pattern?

A. Yes, sir.

Cross-q. 16. Do you consider the outline of Complainant's Exhibits H, I, J, and K substantially the same as the outline of Complainant's Exhibit G?

A. There is one slight variation, but the general shape remains the same.

Cross-q. 17. Do you think that an outline like that of Complainant's Exhibit G was intended as a copy of the outline of Complainant's Exhibits H, I, J, and K?

A. Well, I think it was.

JOS. T. BAILEY.

Subscribed and sworn to before me this 27th day of January, 1870.

R. E. STILWELL,
Examiner, &c.

Adjourned till Friday, January 28, 1870, at 10 a. m.

NEW YORK, *January* 28, 1870— 10 *a. m.*

Present, counsel as before.

HENRY D. MORSE, being called as a witness on behalf of complainants, and being duly sworn, deposes as follows:

Q. 1. What is your name, age, residence, and occupation?

A. Henry D. Morse; my age is forty-three; residence is Dorchester, Mass., and am by occupation a jeweller in Boston, Mass.

Q. 2. How long have you been engaged in this business?

A. About twenty-five years.

Q. 3. Have you ever made designs for silver-ware, and especially for silver forks and spoons?

66 A. I have made a good many designs in the last six or eight years, both for forks and spoons, and other silver articles and jewelry. Designing has been my department to a good extent.

Q. 4. What is the name of your firm?

A. Crosby, Morse & Foss.

Q. 5. Look at Complainant's Exhibits C, D, E, F, and G. Compare their pattern or design with the pattern or design of Complainant's Exhibits H, I, J, and K, and state whether, in your opinion, the two patterns are substantially alike or substantially unlike.

A. I should say they were substantially the same thing, as far as appearance goes.

Q. 6. Compare the pattern of Complainant's Exhibit G with the pattern of Complainant's Exhibit I, and answer the same question.

A. I should say they were, in regard to general effect and appearance, with a slight difference in outline. I should say they were the same in design—that is to say, that an ordinary observer would see no difference between them.

Q. 7. State whether or not the similarity between these patterns is such as would be apt to deceive an ordinary purchaser.

A. I think they would.

Q. 8. What do you say as to the merit of the Cottage pattern for forks and spoons?

A. We have always considered it a good pattern and saleable one.

Q. 9. If a popular pattern in silver be closely imitated in plated ware, how does this imitation affect the market for the silver goods?

A. We have a strong example of that in our business, for when people come in to buy silver goods, they won't touch a pattern that has been imitated in plated ware, in the majority of cases; that is the general result, there may be exceptions to the rule. It would nearly, if not entirely, ruin the sale of the silver goods.

Q. 10. What proportion of the patterns for forks and spoons,
67 which are put upon the market are commercially successful?

A. I cannot state accurately, but I should say perhaps not one in ten or more. This proportion relates to the designs put upon the market, which are culled, as the best, from a large number of original designs. The proportion of original designs which prove successful, I should put at about one to fifty.

Q. 11. What do you say as to the value of a successful pattern of forks and spoons to its owner?

A. I should not think of naming a value in dollars and cents. That would be very difficult to do, but I should say that, if protected in that design, it would be of immense value; and I should further say, as the artist rarely possesses business qualifications, and after spending his time for weeks and months in originating a design, the moment it comes upon the market the capitalist takes the pattern, floods the market, and thereby prevents the originator from receiving any benefit.

(Objected to that part of the answer commencing at the word, "I should further say," as irresponsive and immaterial.)

Cross-examined:

Cross 12. Are you a member of the house of Crosby, Morse & Foss, and how long have you been such?

A. I am, and have been for nearly ten years—ten years the first of next April.

Cross 13. Have you been familiar with the pattern or design represented by Complainant's Exhibits H, I, J, and K?

A. I have.

Cross 14. How have you gained this familiarity?

A. From seeing and selling it.

Cross 15. During what period of time have you sold articles containing this design, and from whom have you procured them?

A. I can't state the length of time, but for several years, and
68 procured them from the Gorham Manufacturing Company.

Cross 16. How largely have you dealt in articles containing this design procured from the Gorham Manufacturing Company, the complainants?

A. That would be impossible to tell, as we rarely enter our sales according to patterns; it merely goes in as a record of spoons without designating the pattern or style.

Cross 17. Should you think your firm had sold as many of this design as of any other?

A. Well, I have no way of judging of that. I should say it has been about as saleable as any they (The Gorham Manufacturing Company) have.

Cross 18. Do you procure other articles of silver-ware from the Gorham Manufacturing Company?

A. We do.

Cross-q. 19. Name them.

A. Speaking generally, I should say all of their manufacture. We buy all of their manufacture that is suited to our market.

Cross-q. 20. Have you been a designer, and are you such at present?

A. I have been, and am.

Cross-q. 21. Look at Complainant's Exhibits E, and F, and state if you see any difference between them?

A. I don't see any difference in design; there is a slight variation in outlines.

Cross-q. 22. Do you not consider that the outline forms a part of the design?

A. I do not in this case. Such a slight variation of outline cannot affect the design.

Cross-q. 23. Do you not observe a much wider difference in outline between Complainant's Exhibits E and G than between E and F?

A. I do.

Cross-q. 24. Look at Complainant's Exhibits C, D, E, F, and G, and Complainant's Exhibits H, I, J, and K, at their nibs or points, and state what differences you observe there—as minutely as possible.

69 A. I should state that the only change I see is that the scroll is turned the other way, and a very slight variation in form, which would not, to a casual observer, materially change the effect.

(The last clause of this answer objected to as not called for by the question.)

Cross-q. 25. Do you not observe an ornament like or resembling a shield at the nib of Exhibits C, D, E, F, G?

A. I do.

Cross-q. 26. Can you see anything resembling a shield on Exhibits H, I, J, and K?

A. Yes; the same thing here, on a smaller scale.

Cross-q. 27. Please specify the elements of the design represented by complainant's Exhibits H, I, J, and K?

A. I should say it was a very simple thread broken by a scroll; I should think that would serve its general description.

Cross-q. 35. Look at Complainant's Exhibits C, D, E, F, & G, and say whether or not the outside edge or bead extends continuously and unbroken around the whole of the handle.

A. It does.

Cross-q. 29. How many beads or raised lines do you observe in Complainant's Exhibits C, D, E, F, and G, extending from the shank to the shoulder?

A. I observe one single line on each side.

Cross-q. 30. How many do you observe between those points in Complainant's Exhibits H, I, J, and K?

A. Two on each side.

Cross-q. 31. Looking at Complainant's Exhibits C, D, E, F, and G, how many raised lines and beads do you observe, commencing at the widest point of the handle and extending toward the nib?

A. Three on each side.

Cross-q. 32. How many, between the same points, on Exhibits H, I, J, and K?

A. Two.

70 Cross-q. 33. Look at Complainant's Exhibits H, I, J, & K, and say whether you observe that the handle is swelled, commencing at a point between the scrolls at the shoulder, extending upward towards the nib and gradually losing itself in the wider part of the handle?

A. Yes, sir.

Cross-q. 34. Do you observe such peculiarity in Complainant's Exhibit G?

A. I observe the same peculiarity, but not so prominent.

Cross-q. 35. Do you think that Complainant's Exhibit G is thicker at the centre, between the scrolls at the shoulder, than the outside bead?

A. It is thicker.

Cross-q. 36. Did you not apply a measuring rule to the handle of Exhibit G before you gave your last answer?

A. I did.

Cross-q. 37. Do you think a casual observer would notice any projection at that point in Complainant's Exhibit G?

A. I think they would notice the convex surface, but not perhaps notice the projection of the surface above the threads on the edge.

Redirect:

R'd. 38. Do you know Mr. Wilcox of the Meriden Brittania Co., and of Rogers & Bro's?

A. I do not know him.

R'd. 39. Were you ever requested by an agent of either of those companies to sell their patterns of any of the Gorham Manufacturing Co.'s goods?

A. There have been applications made by some person whom I understand to come from one of those companies who wanted to buy some article made by the Gorham Manufacturing Company, for the purpose of copying it, which we refused to sell.

Objected to as hearsay evidence, and as irrelevant to the issue.

HENRY D. MORSE.

Subscribed and affirmed to before me this 28th January, 1870.

R. E. STILWELL,
Examiner, &c.

71 Francis T. Bemis, being called as a witness on behalf of complainants, and being duly sworn, deposes as follows:

Q. 1. What is your name, age, residence, and occupation?

A. Francis T. Bemis; my age is 34; residence, Boston; and by occupation a merchant jeweller, of the firm of Bigelow, Kennard & Co.

Q. 2. Does your firm sell forks and spoons, and how long have you been, yourself, in the business of forks and spoons?

A. They do; and I have been in the general business of the firm for 17 years. The firm has been in existence since 1831.

Q. 3. Look at Complainant's Exhibits C, D, E, F, and G; compare them with the pattern of H, I, J, and K, and state whether, in your opinion, the two patterns are substantially alike or substantially unlike.

A. I should say they were substantially alike.

Q. 4. Whether or not is this resemblance sufficient to mislead ordinary purchasers?

A. I should say it was.

Q. 5. Compare Complainant's Exhibit G with Exhibit I, and state whether or not, in your opinion, the resemblance between their patterns as might mislead an ordinary purchaser.

A. I should say it was.

Q. 6. When did you first see forks and spoons in German-silver like complainant's Exhibits C, D, E, F, and G?

A. I saw them before they were put on to the market.

Q. 7. Who showed them to you?

A. Mr. Horace Wilcox.

Q. 8. What passed between yourself and Mr. Horace Wilcox in regard to them at that time?

A. He solicited me to take hold of the goods when he should have them ready, and sell them.

Q. 9. What did he say, if anything, in regard to the pattern?

72 (Objected to as being irrelevant, and immaterial, and hearsay.)

A. He compared it with the Gorham Cottage pattern, stating that that had been one of their best selling patterns, and that we could sell a great many of these—more than of any other pattern that I had.

Q. 10. What did he say in comparing it with the Gorham Cottage pattern?

(Same objection as above.)

A. He used the lever that a salesman will use, that that had been the best selling pattern in the market of the recent designs, and that we could sell a great many of them in plate—that is, in forks and spoons.

Q. 10. When he solicited you to take hold of these goods, did he tell you who was to manufacture them; and if so, who was to manufacture them?

A. I could not say that he told me who was to manufacture them, but I could not have supposed that any one but the Meriden Manufacturing Company would manufacture them, as he represented that house.

(Latter part of the answer objected to as inference by the witness.)

Q. 11. Did you take hold of the goods; and if not, why not?

A. No, sir; I did not think it desirable to.

Q. 12. When he showed you these goods, were they plated or in metal?

A. I couldn't say; I think they were not plated.

Q. 13. Did Mr. Wilcox ever purchase patterns of the Gorham Manufacturing Co.'s goods of your house?

A. I have no recollection of his doing so.

73 Cross-examined:

Cross 14. Do you sell the Gorham Manufacturing Co.'s goods?

A. We do.

Cross 15. How largely, compared with goods purchased from other houses?

A. I can hardly say.

Cross 16. Mention some of the different kinds of articles that you procure of the Gorham Manufacturing Company?

A. Forks and spoons, tea-setts, and the goods that they generally manufacture.

Cross 17. During how many years has your house procured goods of the Gorham Manufacturing Company?

A. I can't say exactly. I guess they have always brought goods to them.

Cross 18. What are the elements which constitute the design or pattern in Complainant's Exhibits H, I, J, and K?

A. The inside line and the ornament at the top and at the shoulder.

Cross 19. Of what does the ornament at the top consist in Exhibits H, I, J, and K?

A. I suppose it would be called a scroll.

Cross 20. Of what does the ornament at the shoulder consist?

A. I don't know the technical terms, but I should again say a scroll or bead.

Cross 21. Do you think that the outline of these Exhibits H, I, J, and K constitutes an element in the design?

A. Well, I should not.

Cross 22. Do you think that the raised surface or projection constitutes an element in the design?

A. Well, it is a very good feature, but I should not think it was an element in the design. One could have that in some other design, just as well.

Cross 23. What difference do you observe between the ornament at the tip of Exhibits H, I, J, and K, and the ornament at the tip of Exhibits C, D, E, F, and G?

74 A. It is a little sharper at the top in the latter than in the former, but that does not affect the general appearance of the design to the casual observer.

Cross 24. Look at Complainant's Exhibit G, and say if you think a casual observer would notice any projection or swelling commencing at the point between the shoulders, and extending toward the nib of the spoon?

A. I hardly think they would, unless their attention were called to it. Casual observers do not generally pay any attention to such things.

Cross 25. Do you think there is any more projection or swelling in that Exhibit G than there is ordinarily to be seen in the handles of spoons and forks, plated or silver?

A. There is no more, I should say, than there ordinarily is in plated ware.

Cross 26. Were you ever engaged in designing?

A. Not at all.

Reëxamination:

R'd. q. 27. Has your house ever dealt in the Cottage pattern of the Gorham Manufacturing Company?

A. We don't keep a stock of it. We only fill special orders.

F. T. BEMIS.

Subscribed and sworn to before me this 28th day of January, 1870.

R. E. STILWELL,
Examiner, &c.

James A. Hayden, being called on behalf of complainants, and being duly sworn, deposes as follows:

Q. 1. What is your name, age, residence, and occupation?

A. James A. Hayden; 44 years of age; reside at Spuyten Duyvil on the Hudson, and am a manufacturer of spoons and forks, and am one of the selling agents of Holmes, Booth & Haydens.

75 Q. 2. How long have you been acquainted with the spoon and fork business?

A. We have been manufacturing those articles for some three or four years.

Q. 3. Look at Exhibits C, D, E, F, and G, compare their pattern with the pattern of Exhibits H, I, J, and K, and state whether the two patterns are substantially alike or substantially unlike?

A. I should say that they were substantially alike; so much so, that I myself who pretend to know something about such things, do not think I could tell the difference between them if I looked at them apart without making a critical examination.

Q. 4. Answer the same question in regard to the patterns in Exhibts G and I.

A. My answer to the former question will also answer this. To see them separate I should not be able to distinguish them one from the other.

Q. 5. What is your opinion of the merit of the Cottage pattern?

A. I think it is one of the most popular patterns that has ever been made, and from my general observation for the last two years, I should think there had been more sold of that pattern than of any new design previously introduced. The demand has been so great that I have made two applications to Mr. Adams, agent of the Gorham Manufacturing Company, to grant us permission to manufacture the same, and did, at the second meeting, ask him if we could not make some arrangement, by paying him royalty, but they declined so to do for the present.

Q. 6. How is the sale of a popular and successful pattern in silver affected by the appearance in the market of a successful imitation in plated ware?

A. We have never been in the silver-ware business, but my belief is, that an imitation would take the place, to quite a large extent, of the pure silver goods, being of the same general appearance, and to the eye of the ordinary purchaser appearing as the same article.

76 Cross-examined:

Cross 7. Do you think that the outline of these exhibits constitute the element of their design?

A. Yes; I think it does.

Cross 8. Do you consider the outline of Complainant's Exhibit G substantially the same as that of Complainant's Exhibits H, I, J, and K.

A. I think the similarity is so strong that it would not be detected without an examination more careful than is usually made by the purchasers of such goods.

Cross 9. Do you observe in Complainant's Exhibit G any peculiarity noticeable at the shoulder?

A. Looking at Exhibit G alone, I find them so much alike that I cannot tell what is a peculiarity in the one without seeing the other.

Cross 10. Do you observe anything at that point—the shoulder—differing from what you have observed in spoons and forks ordinarily? If so, state what.

A. This is different in pattern from some other patterns that I have seen—at the shoulder.

Cross 11. What do you see at that point in Complainant's Exhibit G?

A. I simply see that in shape it is different from any preceding patterns that I have seen out, but I see no peculiarity. I should state that this pattern, at the point you refer to, is the same in every respect to the pattern I have just seen before of the Gorham Cottage pattern; but I have not used a magnifying glass on either.

(Objected to all after the word "I should state," etc., as irresponsive to the question.)

Cross 12. What do you see at the shoulder in Exhibit G which you think enters into the pattern or design of that exhibit?

A. I should say a scroll and a fine marginal line or beading.

Cross 13. Do you see anything else?

77 A. I see nothing more than a similar line at the top of the spoon with a scroll.

Cross 14. How many lines do you observe between the shank and the shoulder?

A. One on each side.

Cross 15. Look at Complainant's Exhibit I, and say if you do not observe at the shoulder, and extending upwards from that point, a projection or swelling at the centre, both in front and rear?

A. I notice it from the fact that my attention has been particularly called to it, but do not think the appearance is changed sufficiently to be observed by the purchasers for consumption of these goods.

Cross 16. Do you think it requires a magnifying glass to see that?

A. No, sir; I do not think it would require a magnifying glass to see the difference, after attention being called to it.

Cross 17. Don't you think that this is a feature of this design?

A. I think it is one of the features, and made so, not perhaps as a special feature, but by the usual custom, as I believe, of making solid silver spoons or forks thicker or heavier in the centre.

Cross 18. Is it not the usual custom to make plated spoons in the same manner?

A. Not universally so.

Cross 19. Looking at Complainant's Exhibit I, how many beads or lines do you find extending from the shank to the shoulder?

A. Two on each side.

Cross 20. As a person familiar with this class of business, describe minutely the difference at the nibs of the Complainant's Exhibits G and I?

A. I don't know that I can state the minute differences between the patterns; I find a slight difference in the lines and scroll at the extreme end of the handle.

Cross 21. Do you see a shield at the extremity of Complainant's Exhibit I, or a knob?

78 A. I should say a nib or a knob, as you may choose to call it.

Cross 22. Do you not see an ornament resembling a shield near the extremity of the handle of Exhibit G?

A. I should call it a nib, or a knob, or a leaf; I should call it a poor design, that might be taken for anything.

Cross 23. Does not the outside bead in Complainant's Exhibit G extend continuously around the handle?

A. Yes, sir; it does.

Cross 24. Is that true with reference to Exhibit I?

A. I should say it does, except a slight break at shoulder, with a scroll; also, a break at the point or end of the handle from the raised figure there, which I think I should call a leaf.

Cross 25. What do you call a leaf upon Complainant's Exhibit I?

A. I refer to the nib and two scrolls, when I say leaf.

J. A. HAYDEN.

Subscribed and sworn to before me this 28th day of January, 1870.

R. E. STILWELL,
Examiner, &c.

CHA'S L. TIFFANY, being called as a witness on behalf of complainant, and being duly sworn, deposes as follows:

Q. 1. What is your name, age, residence, and occupation?

A. Cha's L. Tiffany; I am about fifty-five; reside in New York; am a merchant.

Q. 2. Are you the head of the house of Tiffany & Co.?

A. Yes, sir.

Q. 3. How long have you dealt in forks and spoons?

A. I don't recollect exactly, probably more than twenty-five years.

Q. 4. Look at Complainant's Exhibits C, D, E, F, and G, compare
their pattern with the pattern of H, I, J, K, and state whether,
79 in your opinion, they are substantially alike, or substantially unlike?

A. I have no hesitation in saying that they are substantially alike.

Q. 5. Is the resemblance between them such that, in your opinion, it would be likely to deceive ordinary purchasers?

A. It is.

Q. 7. Whether or not you yourself might be misled on a casual observance?

A. I certainly might, if not beforehand told of the difference and my attention particularly called to it.

Q. 8. What is your opinion of the merit of the Gorham Cottage pattern?

A. It is a decidedly meritorious pattern; a very popular pattern.

Q. 9. What proportion of new patterns for forks and spoons are practical successes in the market?

A. Well, I should say a small proportion.

Q. 10. If a successful pattern in silver be closely imitated in plated ware, how does this effect the sale of the silver goods?

A. It injures the sale of the silver goods. My opinion is that if it did not render the silver pattern entirely worthless it would very seriously injure it.

Q. 11. Please look at the list of witnesses which I now hand you, marked Complainant's Exhibit N, J. A. S., Examiner, and state whether you know the names therein, and the houses to which the respective parties belong; and, if yea, please state their character and standing in the trade.

A. I do know them with a very few exceptions, and I consider them representative men in the trade. I think it would have been impossible to have selected from the whole trade a list more unexceptionable in every respect.

Cross-examined:

Cross 12. Do you sell goods procured from the Gorham Manufacturing Company?

80 A. Yes, sir.

Cross 13. For about how many years have you sold them?

A. I suppose ever since they have been in business.

Cross 14. Look at Complainant's Exhibit G, and say if you think the outline of that exhibit is substantially the same as the outline of Complainant's Exhibits H, I, J, and K?

A. There is more difference in the outline of this one, but still they decidedly resemble each other.

Cross 15. Look at Complainant's Exhibit H, and say if you observe a projection or swelling at the shoulder, and extending upwards toward the wider part of the handle?

A. I do.

Cross 16. Do you consider that an element in the design?

A. I consider it an advantage to a spoon or fork.

Cross 17. Do you observe such a projection or swelling in Complainant's Exhibit G?

A. No, sir.

Cross 18. Do you in Complainant's Exhibit F?

A. I do; a slight one.

Cross 19. Do you think there is any more in Exhibit F than in spoons and forks of ordinary manufacture of the plain styles?

A. I don't think there is.

Cross 20. Is there not quite a difference in the ornament at the tips of Exhibits G and H?

A. There is a difference.

Cross 21. Look at the part of Exhibit G and H, between the shank and the shoulder, and say how *may* beads, or raised lines, there are in each?

A. H has double of G.

C. L. TIFFANY.

Subscribed and sworn to before me this 28th January, 1870.

R. E. STILWELL,
Examiner, &c.

81 WEDNESDAY, *May* 18, 1870.

THE GORHAM MANUFACTURING COMPANY
against
GEORGE C. WHITE.

HENRY B. RENWICK, being produced as a witness on the part of the complainants, and being duly sworn, deposes and says, as follows:

Q. 1. What is your name, age, residence, and business?

A. Henry B. Renwick; age 52; residence, city of New York; my principal occupation at present is the examination of machinery, inventions, and patents; and I do some business with the Patent Office.

Q. 2. Are you experienced as an expert in patent causes, and what experience have you had?

A. During the last 16 or 17 years I have frequently been examined as expert in the courts of the United States for various circuits.

Q. 3. Have you read the letters-patent named in the bill in this cause, and do you understand the invention therein described?

A. I have, and I do.

Q. 4. Will you look at Complainant's Exhibits H, I, J, and K, and state whether or not their design is substantially like or substantially unlike the invention described in the specification and drawings of said letters-patent?

A. I have looked at them, and have examined them several times previously. They are substantially like the invention described in the patent.

Q. 5. Look at Complainant's Exhibits C, D, E, F, and G, and
82 compare them with the specification and drawings of said letters-patent, and state whether or not they are substantially like or substantially unlike the invention described in said specification and drawings?

A. I have examined them several times before to-day, and I have no doubt that Exhibits C, D, E, and F are in all respects substantially identical with the design which is the invention described in that patent. Respecting Ex. G, I have some little doubt, owing to the increased concavity of outline in the broad part or head of the handle; but still think the better opinion is that it is still within the description and drawing of the patent referred to.

Q. 6. What do you mean by the expressions "substantially like," in your answer to the last question?

A. I mean such an identity as would deceive me when going as a purchaser to ask for one spoon, if I should be shown another which was slightly different in minute points either of contour or ornamentation. In the present instance, if I had been shown the Exhibits H, I, J, and K, at one end of a counter and afterwards had been shown C, D, E, and F at the other end of the same counter, I should have taken both sets of exhibits to have been of the same design, and did, in fact, take them so to be until I laid them side by side and compared them minutely. I have even now, when picking them up, and after having had the differences in my mind for several days, to be careful and direct my attention to parts of the spoon where differences exist, in order to be sure that I am taking up the exhibit I wish to. I do not think that every change either in contour or in ornamentation makes a substantial difference in the design; for instance, take one of Rogers' statuettes of soldiers and I do not think the design would be substantially changed so as to evade his patent by substituting a rifle for a musket, or by taking the bayonet off the musket, supposing one existed in the design, or by changing boots for shoes, or vice versa; or take one of his of a soldier drinking, by substituting a round tub for a square trough, or a glass for a tin cup. In a design for a carpet I should think the design was substantially preserved if the main features of the figure were unaltered, and the minor portion were changed by such changes as
83 the substitution of a ring of flowers for a ring of stars, or quatrefoil for a trefoil ornament, and other such changes. In the present instance, the contours of the plaintiff's exhibits and the articles manufactured by the defendant are not only substantially but almost identically the same. Defendant's manufactures, Exhibits D and F, differ more in contour than plaintiff's J differs from defendant's manufacture D. The plaintiff's exhibits and the articles manufactured by the defendant all have a threaded or reeded pattern round the edges, all have a slight knob or boss at the point where there are small shoulders marking the dividing line between the stem and head of the handle, and all have knobbed ornaments near the extreme end of the handle and adjacent to the pointed projection which, in all of them, forms that end. There are, no doubt, minor differences; for instance, the complainant's spoon has two threads along the shank where the defendant's have only one, but that one is of nearly equal width with the two and gives the same effect.

In the complainant's the knobbed ornament at the shoulders is connected with the outer thread, while in defendant's it is connected with the inner thread; but these knobbed ornaments in both are in the same place and have the same general effect; it requiring a very minute examination and actual comparison of the spoons side by side, as I am now doing, to perceive and describe the distinction. In plaintiff's spoons the knobbed ornaments on the inner reed are at the head of the spoon turned upwards and outwards. In the defendant's they are turned downwards and inwards, and the reed is flattened out, but the substantial shape or contour at the end of the spoon, and the ornamentation thereof, by raised ornaments, partly connected and partly unconnected with the threading, is substantially the same in both. Now, I conceive the plaintiff's patent to be for a design, one element of which is the contour or shape of the handle, and the other the ornamentation thereof. The shapes of all the exhibits, as I have before stated, except Exhibit G, are identical, and regarding Exhibit G, as I have already
84 stated, I think the better opinion is that it is within the line of substantial identity. It might deceive me, I think, in going from one store to another, but not if shown me in the same shop where I had just examined one of plaintiff's spoons. With regard to the ornamentation, the substantial characteristics of the design described in the patent are that there shall be a threaded pattern around the edges of the handle, with a small knobbed ornamentation at the shoulders, as before stated; and also at the head of the handle, where it is finished by a pointed projection. I have already said that I find these substantial characteristics in the exhibits manufactured by the defendant, and as I hold the views with regard to substantial identity and design which I have endeavored to express, I therefore state, as before, that Exhibits C, E, F, and D, are, without doubt, in my mind, substantially identical with the plaintiff's patented design, and that the better opinion is that G is in the same category, although altered in degree of concavity at the head of the handle, as I have before stated. It may, perhaps, be well to state, in conclusion, that my eye is, as I have found by comparison with those of others, a very good one in regard to form and proportion, and that the change in the contour of the head of Exhibit G, which is apparent to me would not be perceived by most of those, even mechanics, with whom I am in the habit of conversing with respect to the forms and proportions of machines.

Q. 7. Look at the shank of Exhibits C, D, E, F, and G, and state whether you find their surfaces to be flat or rounding?

A. They are convex between the threads, and that convexity extends into the head of the spoon, the convexity there being less.

HENRY B. RENWICK.

Subscribed and sworn to before me this 18th day of May, 1870.

JOHN A. SHIELDS,
Examiner, &c.

85 United States circuit court, southern district of New York.

GORHAM MANUFACTURING COMPANY,
against
GEORGE C. WHITE.
} In equity.

It is hereby stipulated and agreed by and between the respective parties that the testimony in the above-entitled cause is now closed. And the defendant hereby waives his right to cross-examine Henry B. Renwick, a witness produced and examined on the part of the complainant.

Dated New York, May 27, 1870.

KELLER & BLAKE,
Solicitors for Complainant.
GEO. GIFFORD,
Solicitor for Defendant.

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EXHIBIT A.

John Gorham, Gorham Thurber, Lewis Dexter, Jr.—Letters-patent, No. 1,440, *July* 16, 1861.

To all whom it may concern:

Be it known that we, John Gorham, Gorham Thurber, and Lewis Dexter, jr., of Providence, in the State of Rhode Island, have invented and produced a new design for the handles of table spoons and forks; and we do hereby declare that the following is a full, clear, and exact description thereof, reference being had to the accompanying drawings, making part of this specification, in which—

Fig. 1 is a plan of the upper surface, and

Fig. 2, a like view of the under surface.

Figs. 3 and 4 are cross sections taken at the narrowest and at the widest part of the handle; and

In Figs. 1 and 2 of the accompanying drawings, *a* represents the stem of the handle either of a spoon or fork, and *b* the enlarged end thereof, The stem is gradually but slightly increased in width from about the middle of its length towards each end, the swell being more sudden at *c* where it joins the bowl or fork. At the rear extremity of the stem, where the enlarged part *b* commences, it spreads out on each side with a rounded shoulder, *d d*, and then gradually spreads out in concave lines, as at *e e*, these lines gradually becoming convex to the widest part, where they run back and inwards, as at *f f*, finally uniting to form a nearly semi-circular end. Along each edge there is a small rounded moulding, *g g*, and just within this a second moulding, *h h*, and at the shoulders, *d d*, these mouldings that look like wires are united by two rosettes, having somewhat the appearance produced by twisting together the ends of wires to unite them.

87 And at the rear end the two sets of mouldings from each side are turned into a rosette, the two rosettes, as at *i i*, coming in contact in the middle of the width of the handle, a small rounded tip, *j*, making the central finish. Between the two inner mouldings the surface is swelled as at *k*, Figs. 3 and 4, this swell being gradually flattened towards the widest part of the handle.

What we claim as new and desire to secure by letters-patent, is the design herein specified for the handles of spoons and forks, as set forth and represented.

JOHN GORHAM.
GORHAM THURBER.
LEWIS DEXTER, JR.

Witnesses:
HENRY MARTIN.
ALBERT M. HEWITT.

88 EXHIBIT N.

3. Edward C. Moore, of Tiffany & Co.
4. Charles T. Cook, " " " "
15. James H. Whitehouse, of Tiffany & Co.
5. Egbert W. Sperry, Manf'r for Redfield & Rice M'f'g Co.
6. Martin S. Smith, (of Detroit,) M. S. Smith & Co.
7. Newell Matson, (Milwaukee and Chicago,) N. Matson & Co.
8. Theodore B. Starr, of Starr & Marcus.
9. Edw'd V. Haughwout, of E. V. Haughwout & Co.
10. Henry H. Hayden, of Holmes, Booth & Haydens.
11. John Gleave, Die sinker.
12. George B. Tobey, salesman Gorham M'f'g Co.
13. Alfred Brabrook, agent for Reed & Barton.
14. Reuben R. Haskell, salesman Gorham M'f'g Co.
James B. Church, Hall, Elton & Co.
J. T. Bailey, of Bailey & Co., Phil.
Henry D. Morse, of Crosby, Morse & Foss, Boston.
F. T. Bemis, of Bigelow, Kennard & Co., "
James A. Hayden, of Holmes, Booth & Haydens, N. Y.

89 U. S. circuit court, southern district of New York.

THE GORHAM MANUFACTURING COMPANY
vs.
GEORGE C. WHITE.
} In equity.

Testimony taken on the part of the defendant in the above cause, under and pursuant to the 67th rule in equity, before Joseph Gutman, jr., examiner.

N. Y., *April* 21, 1870—10 *a. m.*

Examination adjourned to April 22, 1870, at 10 a. m.

N. Y., *April* 22, 1870—10 *a. m.*

Present, C. F. Blake, esq., for complainants, and Geo. Gifford, esq., for defendant.

HENRY T. BROWN, a witness of lawful age, produced on the part of the defendant, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein, and, being examined by Mr. Gifford, counsel for the defendant, deposes and says: 90

1. Q. What is your name, age, residence, and occupation?

A. My name is Henry T. Brown; I am 44 years of age; I reside at Brooklyn, N. Y.; I am a solicitor of patents, and editor of the American Artisan.

(Defendant's counsel here puts in evidence letters-patent of the United States to Le Roy S. White for a design for the handle of a fork or spoon, which is dated the 15th day of January, 1867, and numbered 2551, and is marked Exhibit No. 6.

Also letters-patent of the United States to Le Roy S. White for a design for a spoon or fork handle, dated the 1st of March, 1868, and numbered 2992, and which is marked Exhibit No. 7.)

2. Q. Who were the solicitors that obtained the two patents issued to Le Roy S. White, and which are marked Exhibits No. 6 and No. 7?

A. I do not know positively in the case of No. 6—I presume from the signature that it was Munn & Co. The application for No. 7 was made through my firm of Brown, Coombs & Co.

3. Q. Please look at the fork labelled Complainant's Exhibit F, and the spoon Exhibit C, and state whether the design of those is in accordance with the design described in either of the said patents; and if yea, state which one it is in accordance with.

A. It is made in accordance with the patent Exhibit No. 6.

91 4. Q. Please look at the drawing now shown you, marked Exhibit No. 1, and state whether or not it correctly represents the design described in the White patent, marked Exhibit No. 6.

A. It does in all essential particulars. It corresponds exactly with the specification of the patent.

5. Q. Please look at spoon marked Complainant's Exhibit G, and state whether or not the design of it is in conformity to the design described in either of the White patents, Exhibit 6 and Exhibit 7; and if yea, with which one?

A. Its design is in conformity with the White patent, Exhibit No. 7.

6. Q. Look at the drawing, marked Exhibit No. 2, and state whether or not it correctly represents the design described in the White patent, Exhibit No. 7.

A. It does.

(Defendant's counsel here puts in evidence a certified copy of letters-patent granted to John Gorham, Gorham Thurber, and Lewis Dexter, jr., and dated the 17th July, 1861, and which is marked Exhibit No. 8.)

7. Q. Please look at the drawing, marked Exhibit No. 3, and state whether it correctly represents the design described in Exhibit No. 8.

A. It represents it correctly.

8. Q. Please state whether the design of fork, Exhibit F, and which is described in the patent to White, Exhibit 6, and also represented by drawing, Exhibit 1, is substantially like or substantially different from the design described in the copy of patent to Gorham, Thurber and Dexter, which is marked Exhibit No. 8.

A. It is substantially different from it.

9. Q. What do you find in the design described in said patent to Gorham, Thurber and Dexter, which is not in the design, marked Complainant's Exhibit F?

92 A. I find in the patent of Gorham, Thurber and Dexter, that the two mouldings are united by two rosettes at the shoulders, marked *d d* in the drawing of the patent. I do not find the mouldings so united in Exhibit F, nor do I find anything which resembles a rosette at *d d*, as described in the patent. I find in the patent the design described as having the two sets of mouldings from each side turned into a rosette. The two sets of mouldings are not so turned into a rosette in Exhibit F. The patent describes the lines of the spoon as running back and inwards, and uniting to form a nearly semi-circular end. In Exhibit F the lines do not unite to form a semi-circular end; in the patent the inner mouldings run the whole length of the handle; in Exhibit F they run only a part of the way.

10. Q. What do you find in the design of fork, Exhibit F, and spoon, Exhibit C, which is not described or shown in the Gorham, Thurber and Dexter patent, Exhibit No. 8?

A. I find a semi-elliptical or shield-shaped end; I find the inner mouldings, along the edges, turned inward towards each other near the end of the handle; I find the inner mouldings turned inward towards each other in a scroll form at the shoulders, marked *d d* in the patent;

I find two mouldings running from the inside of the inner of the two mouldings, which I have before referred to, at points forward of the widest part of the handle to the scrolls of the inner of the two sets of mouldings in a curved form. These mouldings are not in the patent. I also find a shield-shaped ornament between the moulding of the shield-shaped end of the handle and those scrolls of the inner moulding nearest the end of the handle. I find the outside moulding in the exhibit runs continuously all the way along both sides and around the end of the handle.

11. Q. What do you find in the design described in the Gorham, Thurber and Dexter patent, marked Exhibit No. 8, which is not in the design of spoon, Exhibit G?

93 A. I find, in addition to all that I have enumerated with regard to Exhibits F and C, that it spreads out gradually from the rounded shoulders *d d*, referred to in the specification, in concave lines all the way to the convex lines which form the outline of the widest part of the handle, the width of the handle increasing all the way from the shoulders *d d* to the widest part.

12. Q. How is it with spoon, marked Complainant's Exhibit G, as to the handle widening or narrowing as you proceed back from the shoulders?

A. It widens for a short distance only, and then becomes narrower, and continues so for some distance in a backward direction.

13. Q. In your last answer you consider the shoulders to be at the points where the wide part meets the stem, do you not?

A. Yes.

14. Q. Please look at the spoons, marked Exhibits No. 9 and No. 10, and state how the outlines of the handles along their edges correspond with the outline of spoon, Exhibit G, along its edge, until the guard projection at the back end is reached.

A. They correspond in all essential particulars.

15. Q. Please look at the drawing, marked Exhibit No. 11, and state whether it correctly represents the outlines of the edges of the handles of the last three-mentioned spoons, so far as the drawing purports to represent the edges.

A. It represents them correctly. It represents Exhibits 9 and 10 exactly, and Exhibit G generally—there is only a slight difference in degree. The contraction above the shoulders in Exhibit G is rather greater than in the others.

16. Q. Now, assuming the outlines along the edges of Exhibit I,
94 Exhibit F, and Exhibit G, all to be of old forms and well known prior to the invention or formation of the design described in the said patent to Gorham, Thurber and Dexter, then what can you say as to whether or not the designs of Exhibit G and Exhibit F borrowing anything or using anything which is novel in the design described in that patent, that is, whether or not there was anything so borrowed?

A. I see nothing which has the appearance to me of having been so borrowed.

And being cross-examined by Mr. Blake, counsel for complainant, he deposes and says:

17. Cross-q. What is your business?

A. Solicitor of patents and editor of the Artisan.

18. Cross-q. How long have you been a solicitor of patents?

A. I believe 24 years in the business, as draftsman and preparer of specifications.

19. Cross-q. What experience have you had in taking out patents for designs?

A. Nearly 21 years.

20. Cross-q. Have you ever been concerned in a litigated application for a design-patent, or any suit for an infringement of a design-patent? and if so, state the names of the cases.

A. I have not.

21. Cross-q. Look at Complainant's Exhibit J, and Defendant's Exhibit No. 9, and state whether, in your opinion, as an expert, there is a patentable difference between them.

A. I think there is.

22. Cross-q. Do you think any one could mistake one for the other?

A. I think not.

HENRY T. BROWN.

Subscribed and sworn to before me this 22d day of April, 1870.

JOSEPH GUTMAN, JR.,
Examiner, &c.

95 DIXON G. HUGHES, a witness of lawful age, produced on the part of the defendant, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy herein, and being examined by Mr. Gifford, deposes and says as follows:

1. Q. What is your name, age, residence, and occupation?

A. My name is Dixon G. Hughes; I am 30 years of age; I reside at New York; I am a clerk in a silver-ware manufacturing establishment.

2. Q. Please look at spoon, Exhibit No. 9, and state how long you have known spoons having handles of that design?

A. From fifteen to twenty years.

3. Q. Please look at the fork handle, Exhibit H, and which is represented by drawing, Exhibit No. 3, and the fork handle, Exhibit F, and which is represented by drawing, Exhibit No. 1, and state whether the designs of those two fork handles are substantially the same or substantially different from each other?

A. They are substantially different from each other?

4. Q. Now look at the fork handle, Exhibit H, and at the spoon handle, Exhibit G, and state whether they are substantially the same design or substantially different?

A. They are substantially different.

And being cross-examined by Mr. Blake, he deposes and says:

5. Cross-q. When did you first see a fork or spoon of the pattern of Exhibit No. 9?

A. About fifteen or twenty years ago.

6. Cross-q. In whose employ are you?

A. Wood & Hughes.

7. Cross-q. In what capacity are you employed?

96 A. As clerk; I exercise a general supervision of the spoon department.

8. Cross-q. Are you a salesman?

A. Yes, sir.

9. Cross-q. What is the business of Wood & Hughes, and where do they carry it on?

A. Manufacturers of silver-ware, at New York City. Factory is at 101 Cliff street; office, 102 Fulton street.

10. Cross-q. Do they sell any other goods than those of their own manufacture?

A. They do.

11. Cross-q. Have they ever sold forks or spoons like Exhibit C, D, F, and G; I mean of the same design?

A. Yes, sir; to fill orders.

12. Cross-q. Do they advertise in their price-list or circulars, that they will furnish forks and spoons of such design?

A. They do not.

Redirect examination:

13. Re'd. You say you have known spoons having handles of the design like Exhibit No. 9, fifteen or twenty years; have you known them of that design as an article of merchandise known in the market as long as that?

A. I have.

DIXON G. HUGHES.

Subscribed and sworn to before me this 22d day of April, 1870.

JOSEPH GUTMAN, Jr.,
Examiner, *etc.*

97 **Benmore Maclin**, a witness of lawful age, produced on the part of the defendant, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and being examined by Mr. Gifford, deposes and says as follows:

1. Q. What is your name, age, residence, and occupation?

A. Benmore Maclin; I am about 43 years of age; I reside at Williamsburgh, N. Y.; I am a die-sinker.

2. Q. For what kind of wares are you a die-sinker?

A. Spoons, and whatever is necessary in the silver trade generally.

3. Q. Please look at spoons marked Exhibits No. 9 and No. 10, and say how long you have known spoons with handles of those designs?

A. I have known them ever since 1846 and 1847.

4. Q. Have you known them for that length of time as articles of merchandise in the market?

A. Yes, sir.

5. Q. Please look at spoon handle marked Exhibit K, and which is represented by drawing, Exhibit No. 3, and then at fork handle marked Exhibit F, and which is represented by drawing, Exhibit No. 1, and say whether the designs of those two handles are substantially the same or substantially different?

A. They are substantially different.

6. Q. Now, look at the spoon handle marked Exhibit K, and at the spoon handle, marked Exhibit G, and state whether they are substantially the same or substantially different?

A. They are substantially different.

7. Q. Does your business as a die-sinker involve making dies for different designs?

A. Yes, sir.

98 8. Q. How long have you been engaged in that business?

A. Ever since I was of age to go to a trade. My father was a die-sinker before.

And being cross-examined by Mr. Blake, he deposes and says as follows:

9. Cross-q. In whose employment are you?

A. In my own.

10. Cross-q. Have you been employed at any time by George C. White, or by Rogers & Brother? If so, how largely?

A. No, sir; not to my knowledge.

11. Cross-q. When you say that Exhibit K, and Exhibit G are substantially different, do you mean that it would need different dies to make them?

A. Yes, sir.

Redirect examination:

12. Re'd. Do you not also mean that the designs are substantially different which are stamped or rolled from the dies?

(Objected to as leading.)

A. Yes, sir.

B. MACLIN.

Subscribed and sworn to before me this 22d day of April, 1870.

JOSEPH GUTMAN, Jr.,
Examiner, etc.

A. Sidney Doane, a witness of lawful age, produced on the part of the defendant, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the 99 matter of controversy herein, and being examined by Mr. Gifford, deposes and says as follows:

1. Q. What is your name, age, residence, and occupation?

A. My name is A. Sidney Doane; I am 36 years of age; I reside at New York City; I am solicitor of patents, and I am also interested in the sale of machinery in which I have an interest through patents.

2. Q. Please look at the spoon, marked Exhibit K, and the fork, marked Exhibit F, and say whether the designs of the handles are substantially the same or substantially different?

A. Substantially different.

3. Q. Please mention some of the leading differences?

A. In the fork, marked Exhibit F, there is a single line running along the stem portion of the handle, and in Exhibit K, there seems to be two lines running along the stem portion of the handle. In Exhibit K these lines are turned inward, and form scrolls on what I suppose would be termed the shoulders of the handle of the spoon, and in Exhibit F the outer line is not united with the inner line or moulding, the end of which is turned inward and forms a scroll. The centre pieces in the two Exhibits at the extreme back end of the handle are essentially different. The inner line in Exhibit K runs upward and forms a scroll or rosette, while in Exhibit F this scroll or rosette is formed by the termination of an outer line turning downward. The portion of the stem of the handle above the shoulders in Exhibit K seems to project outwards to a certain extent, while in Exhibit F this portion seems to be perfectly flat.

4. Q. Now look at Exhibit G, and state whether the design of the handle of that spoon is substantially the same or subsnantially different from the design of the handle of spoon, Exhibit K, and if you say they are substantially different, please mention some of the leading differences?

100 A. They are substantially different. In Exhibit G there is a line running continuously along the stem and upper portion of the handle, and within is a figure formed of a line terminating at each end in a scroll, and also a second line running from the scroll and termin-

ating in the first line. The design of the centre pieces at the end of the handle is also different. Now, in Exhibit K we have two lines upon the stem of the handle running from the portion where the bowl of the spoon is formed to the shoulder and then being continued, and the inner lines terminating in the scroll portion of the centre piece. I notice also that one of these spoons is flatter than the other at the point near the shoulders.

5. Q. Assuming that the outline along the edges of the spoon handle, Exhibit G, was known before the formation of the design of Exhibit K, is there anything in the design of the handle in Exhibit G, borrowed or taken from the design of the handle in Exhibit K?

A. Nothing.

And being cross-examined by Mr. Blake he deposes and says as follows:

6. Cross-q. How long have you been a solicitor of patents?

A. Since 1856.

7. Cross-q. What was your business before that time?

A. I was graduated at the New York University in 1855, about the middle of the year, and for six months previous to my adopting my present profession, I was interested in the sale of a patent paging machine.

8. Cross-q. Do you own interests in patents, or do you in the practice of your profession acquire interest in patents which you are soliciting before the office?

A. I own an interest. I have never acquired through professional services interests save in one patent.

101 9. Cross-q. Is it part of your business to negotiate sales of patents?

A. It is not.

10. Cross-q. Have you had any experience in a litigated design-patent before the office, or in suits on design-patents before the court?

A. I have not. I never knew of but one design-patent in litigation, aside from the present proceeding.

A. SIDNEY DOANE.

Subscribed and sworn to before me this 22d April, 1870.

JOSEPH GUTMAN, Jr.,
Examiner, etc.

Richard H. Rogers, a witness of lawful age, produced on the part of the defendant, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein, and being examined by Mr. Gifford, counsel for defendant, deposes and says as follows:

1. Q. What is your name, age, residence, and occupation?

A. My name is Richard H. Rogers; I am 31 years old; I reside at the city of New York; I am an engraver and die-sinker.

2. Q. Please look at the fork handle marked Exhibit H, and which is also represented on drawing Exhibit No. 3, and at the fork handle Exhibit F, and which is represented by drawing Exhibit No 1, and state whether the designs of these two handles are substantially the same or substantially different; and if you say they are substantially different, please mention some of the leading differences.

A. These two handles are substantially different, both in their

102 shape and in their design. The handle Exhibit H, where it leaves the stem at the shoulder, moves immediately outward, widening the area until it reaches the top. The handle marked F, where it leaves the shoulder, proeeeds more in a right line at first; then curves slightly inward, diminishing the area; then curves outward until it forms the top of the spoon. There is also a difference in the handles on their upper and under surfaces, the handle marked H being swelled out or raised at the shoulder both on its upper and under surface, while the handle marked F is neither raised nor depressed distinctly above the shoulder, but merely enough to distinguish it from a dead flat surface. There is also a difference in the ornamental devices on the upper and under surfaces of the spoons. The handle marked H has a raised line or bead on the outside edge, and another one immediately within it; the handle marked F has but one line on the outside and none on the inside. The inside line on the stem of the handle marked H terminates in a blunt, rounded shape, the outside line being discontinued at the point where the blade or bowl of the fork or spoon joins to the stem. The outside line of the handle marked F terminates in a sharp point. On the handle of the spoon marked H there is also an outside and an inside line, there being two lines in all; on the handle marked F, there is also an outside and an inside line, and also an additional line inside of these, making three lines altogether. The inside line of the handle H is parallel with the outside line in all its course until it reaches the end, where it is turned into an outward scroll. The inside line of handle F is parallel with the outside until it reaches about quarter of an inch to the end of the handle, where its direction is turned inwards. From where this line is turned inward to the outer end of the handle there is enclosed an area of about a quarter of an inch, the form of which resembles an inverted shield, in which shield there is a raised part like a tongue or line. In the handle marked H there is not this shield-like form or shape, there being merely a very minute ball
103 or piece left to finish the end of the handle. On the handle marked F there is a third line within the second line, moving from the rosette formed at the upper end of the second line in an eccentric course until it meets the second line at about one-third the distance to the shoulder; on the handle Exhibit H there is no such line. The handle F is alike in device on both its upper and under surface; the handle marked H is not, the stem of the handle where it joins the bowl being more elaborated and differently ornamented on its under surface than on its upper surface, the upper surface being left plain where the outside line leaves the inside line, which space or area on the under side is filled in with a raised tongue. The outside line on handle marked F is one continuous line; the outside line on handle H is broken at the shoulder, where it is turned inward, forming a rosette, a line being attached to that rosette and carried down the outside edge of the stem, giving it an appearance as though the inside line on the handle and the outside line on the stem were continuous, and the outside line on the handle and the inside line of the stem were joined.

3. Q. Now look at the handle of the spoon marked Exhibit G, and state whether or not the design of it differs from the design of handle marked Exhibit H in the same particulars which are specified in your last answer.

A. It does, but the difference is more marked. The handle marked H has the shape like the outside line of a pear, while that marked G resembles the outer shape of a violin.

And being cross-examined by Mr. Blake, he deposes and says as follows:

4. Cross-q. Have you ever worked for the defendant or for Rogers & Brothers, the silver manufacturers?

A. I have done work for them in my own shop. I have not been in their employ.

5. Cross-q. Do you still make dies for them?

104 A. I do not make dies for them. I make stamps and punches.

6. Cross-q. Did you make the stamps and punches used in making exhibits F and G?

A. I did not.

7. Cross-q. Did you know beforehand that Rogers & Brother or the defendant intended to manufacture and put on the market goods like Exhibits F and G?

A. No.

And being further examined by Mr. Gifford, he says:

8. Re'd. Are you any connection of any of the members of Rogers & Brother, manufacturers at Waterbury, Connecticut?

A. I am not.

RICHARD H. ROGERS.

Subscribed and sworn to before me this 22d April, 1870.

JOSEPH GUTMAN, Jr.,
Examiner, etc.

Albert Coles, a witness of lawful age, produced on the part of the defendant, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein, and being examined by Mr. Gifford, deposes and says as follows:

1. Q. What is your name, age, residence, and occupation?

A. My name is Albert Coles. I am about 59 years of age; I reside in the city of New York; I am a silversmith.

105 2. Q. How long have you been in that business, and where?

A. Over 30 years, at No. 6 Liberty Place.

3. Q. Please look at the handle of the spoon marked Complainant's Exhibit I, and the fork, marked Complainant's Exhibit F, and state whether the designs of the handles are substantially alike or substantially different.

A. They are substantially different.

4. Q. Now look at the spoon marked Complainants' Exhibit K, and the spoon, marked Complainant's Exhibit G, and state whether the designs of the handles of those spoons are substantially alike or substantially different.

A. They are substantially different.

5. Q. Do you carry on the business of manufacturing on your own account?

A. Yes, sir.

6. Q. Have you been accustomed to notice the different designs for handles of spoons and forks during your business operations?

A. Yes, to a considerable extent. My business involves the manufacture.

And being cross-examined by Mr. Blake, he deposes and says:

7. Cross-q. What is the name of your firm?

A. A. Coles & Co.

8. Cross-q. Do you manufacture and sell silver and plated forks and spoons?

A. We sell no plated ones, except we might have an order for half a dozen or so, which might happen once in six months.

9. Cross-q. Have you ever sold plated goods like Exhibits F and G?

106 A. I think not. I might have bought Exhibit F of Rogers.

ALBERT COLES.

Subscribed and sworn to before me this 22d April, 1870.

JOSEPH GUTMAN, Jr.,
Examiner, etc.

Anthony Schaefer, a witness of lawful age, produced on the part of the defendant, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein, and being examined by Mr. Gifford, counsel for defendant, he deposes and says:

1. Q. What is your name, age, residence, and occupation?

A. My name is Anthony Schaefer; I am 41 years of age; I live in the city of New York; I am a die-sinker, and make designs also.

2. Q. How long have you been engaged in that business?

A. About 14 years.

3. Q. Look at the handle of the fork marked Exhibit H, and the handle of the fork marked Exhibit F, and say whether the designs of these two handles are substantially the same or substantially different.

A. The designs are not the same; they are different.

4. Q. Now look at the handle of the spoon marked Complainant's Exhibit I, and the handle of the spoon marked Complainant's Exhibit G, and say whether the designs of the handles of those two spoons are substantially alike or substantially different.

A. The designs are more different than the former, particularly in the outline.

107 And being cross-examined by Mr. Blake, he deposes and says:

5. Cross-q. What is the name of your firm?

A. My own name, Anthony Schaefer.

6. Cross-q. Have you ever done work for the defendant, or for Rogers and Brother?

A. No, never.

ANTHONY SCHAEFER.

Subscribed and sworn to before me this 22d April, 1870.

JOSEPH GUTMAN, Jr.,
Examiner, &c.

Francis W. Cooper, a witness of lawful age, produced on the part of the complainant, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein, and being examined by Mr. Gifford, counsel for defendant, he deposes and says:

1. Q. What is your name, age, residence, and occupation?

A. My name is Francis W. Cooper; I am 54 years of age; I reside at New York City; I am a manufacturer of silver-ware.

2. Q. State whether or not you are also a designer?

A. Yes, sir.

3. Q. How long have you been engaged in that business?

A. Twenty-five years.

4. Q. Have you during that time been accustomed to notice different designs for handles for spoons and forks?

A. Yes, sir.

5. Q. Please look at the handle of the fork marked Exhibit H,
108 and the handle of the fork marked Exhibit F, and state whether
or not the designs of those two handles are substantially the
same or substantially different.

A. They are substantially different.

6. Q. Now look at the handle of the spoon marked Exhibit I, and the handle of the spoon marked Exhibit G, and state whether or not the designs of those two handles are substantially alike or substantially different.

A. Quite different.

And being cross-examined by Mr. Blake, he deposes and says:

7. Cross-q. When was your attention first called to these differences, and by whom?

A. About twelve years ago, by myself.

8. Cross-q. What occasion had you to consider them about twelve years ago?

A. Business leading to it—selling and buying.

9. Cross-q. Have you ever sold any goods of the design of Exhibits G, F, or D; and if so, how many have you sold, and for how many years have you sold them?

A. I have. I cannot tell how many I have sold. I think I have sold them for possibly two or three years.

10. Cross-q. What then caused you to compare the two designs about twelve years ago?

A. It naturally comes under our observation.

11. Cross-q. How did the difference between these designs come under your observation?

A. From beauty and elegance of design we have reason to look at them.

12. Cross-q. What occurred in your business which led you about twelve years ago to compare these two designs?

A. I may have been mistaken as to the date—I cannot say.

109 13. Cross-q. Fix the date as nearly as you can when you first
compared these two designs, and then answer the last question?

A. In 1867, through a customer. I had occasion to find the same pattern.

14. Cross-q. What do you mean by the same pattern?

A. I mean Exhibit H.

15. Cross-q. For what purpose had you occasion to find the same pattern as Exhibit H?

A. I did answer that—for a customer.

16. Cross-q. What did the customer want of it, if you know?

A. To match other work.

17. Cross-q. What other work did you desire to match?

A. That same pattern, Exhibit H.

18. Cross-q. Did you find goods like Exhibits, D, F, and G, to match goods like Exhibit H?

A. No, sir.

19. Cross-q. State what passed between the customer and yourself which led you to compare these two designs?

A. Nothing more than he brought this kind of a fork, which it was our business to match as near as we can; if we haven't it, we get it.

20. Cross-q. Did you then have goods like Exhibit D, on hand for sale?

A. No, sir.

21. Cross-q. Did you send and get such goods?

A. No, sir.

22. Cross-q. How then did you obtain goods like Exhibit D to compare with Exhibit H, when your customer came there in 1867?

(Objected to, because the witness has not said that he obtained goods of that kind.)

110 A. We go to different stores and factories.

23. Cross-q. Where did you go for this purpose?

A. I could not answer that. I don't know.

24. Cross-q, Did you not know at that time that goods like Exhibit H were manufactured by the Gorham Manufacturing Company?

A. No, sir; it is difficult to remember all those things.

25. Cross-q. When did you first know that goods like Exhibit H were manufactured by the Gorham Manufacturing Company?

A. Four or five years ago.

26. Cross-q. Have not such goods long been known in the market as the Gorham Manufacturing Company's Cottage pattern?

A. Not to my knowledge.

27. Cross-q. For what purpose did your customer say he wanted to match goods like Exhibit H?

A. I do not recollect exactly.

28. Cross-q. When a customer brings you goods in silver and wishes you to match them, is it your practice to try to match them with plated goods?

A. No, sir.

29. Cross-q. Was the spoon or fork like Exhibit H, that you tried to match, in silver or in plate?

A. I believed it to be silver.

30. Cross-q. Were the goods like Exhibit D that you looked at when you tried to match goods like Exhibit H, in silver or in plate?

(Objected to, because he has not said he looked at goods like Exhibit D, with which he tried to match goods like H.)

A. The ones I meant were silver.

111 31. Cross-q. Do you swear that you ever saw goods of the design of Exhibits D, F, and G, in silver?

A. No, sir.

32. Cross-q. Was it not your purpose and the purpose of your customer, as stated to you, to find goods so nearly like Exhibit H, that purchasers would believe their design to be the same?

A. That I cannot say.

33. Cross-q. Will you swear that it was not?

A. No, sir.

34. Cross-q. How long have you known that goods like Exhibit D in plate were imitations of goods like Exhibit H?

(Objected to, because the witness has said nothing about imitations.)

A. I cannot say; my business is silver.

35. Cross-q. Do you not, as a manufacturer of silver, believe that the existence in the market of goods like Exhibit D, in plate, is likely to injure the sale of goods like Exhibit H, in silver?

A. In time it might.

F. W. COOPER.

Subscribed and sworn to before me this 22d day of April, 1870.

JOSEPH GUTMAN, Jr.,
Examiner, etc.

Adjourned to April 25th, 1870, at 12 m.

112 N. Y., *April* 25, 1870—12 *m.*

Present, counsel as before.

Charles Wood, a witness of lawful age, produced on the part of the defendant, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein, and being examined by Mr. Gifford, deposes and says, as follows:

1. Q. What is your name, age, residence, and occupation?

A. My name is Charles Wood; I am about 50 years of age; I reside at the city of New York; I am a manufacturer of silver-ware.

2. Q. How long have you been engaged in such manufacture, and are you so engaged on your own account?

A. About 25 years; I was six years an apprentice at the spoon-making business before this; I am so engaged in business on my own account. My firm is Wood & Hughes.

3. Q. Have you a store in the city of New York?

A. Yes, sir.

4. Q. Please state whether or not your business has led you during the course of your business to examine different designs for silver and plated spoon and fork handles among other things?

A. Yes, sir; it always does more or less.

5. Q. Please look at the handle of the spoon, Complainant's Exhibit I, and the handle of the spoon, Complainant's Exhibit C, and state whether or not the designs of those two handles are substantially the same or substantially different from each other?

A. I consider them quite different.

113 6. Q. Please look at the spoon, Complainant's Exhibit I, and at the spoon Complainant's Exhibit G, and state whether or not the designs of the handles of those two spoons are substantially the same or substantially different from each other?

A. I consider them very different.

And being cross-examined by Mr. Blake, he deposes and says:

7. Cross-q. What is the name of your firm?

A. Wood & Hughes.

8. Cross-q. Has your firm ever sold goods of the pattern of Complainant's Exhibit G or D; if so, how extensively?

A. No, sir; never.

9. Cross-q. Has your firm ever sold any goods like Complainant's Exhibit I?

A. No, sir.

10. Cross-q. Has your firm ever copied, in whole or in part, any of the designs of the Gorham Manufacturing Co.?

A. No, sir.

11. Cross-q. Do you know the Grecian pattern, so called, of the Gorham Manufacturing Co.?

A. No, sir.

12. Cross-q. Are you acquainted with the different styles of spoons sold by the Gorham Manufacturing Co.?

A. No, sir, I cannot say that I am; I know some of them.

13. Cross-q. Are you acquainted with a spoon sold by the Gorham Manufacturing Co., having a round shank and an acanthus leaf head?

A. I have seen one something similar to that; a shell head; I do not know what kind of a leaf you call it.

114 14. Cross-q. Do not your firm make and sell a spoon having a flat shank and a very similar head to that of the Gorham Manufacturing Co.'s spoon just mentioned?

A. We make a concave shank, with a shell head, but it is not at all like the Gorham spoon, no more than a hog is like a sheep.

CHARLES WOOD.

Subscribed and sworn to before me this 25th April, 1870.

JOSEPH GUTMAN, Jr.,
Examiner, &c.

Abraham Wood, a witness of lawful age, produced on the part of the defendant, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein, and being examined by Mr. Gifford, counsel for defendant, deposes and says:

1. Q. What is your name, age, residence, and occupation?

A. My name is Abraham Wood; I am 53 years of age; I reside at the city of New York: I am a silversmith.

2. Q. Did you learn the trade of silversmith, and how long have you been in the business, and are you a member of any firm; if yea, what firm, and are you a relative of the last witness, Charles Wood?

A. I did learn the trade; I have been in the trade since 1832, nearly ever since; I am a member of the firm of A. & W. Wood; I am a relative of Charles Wood, the last witness; I am his brother.

3. Q. Are you members of the same firm, or are your firms distinct from each other?

A. They are distinct from each other.

4. Q. Does your firm manufacture silver-ware, including spoons and forks; and if yea, where is their establishment?

115 A. It does; their factory is at the corner of Elm and Franklin streets, New York City.

5. Q. Please look at the spoon handle Complainant's Exhibit I, and the spoon handle Complainant's Exhibit C, and state whether the designs of those two handles are substantially alike or substantially unlike?

A. Substantially unlike.

6. Q. Now, look again at Complainant's Exhibit I, and at Complainant's Exhibit G, and state whether the designs of the handles of those two spoons are substantially alike or substantially unlike each other?

A. Substantially unlike.

And being cross-examined by Mr. Blake, he deposes and says as follows:

7. Cross-q, Compare the designs of Exhibit C and Exhibit G, and state whether, in your opinion, they are substantially alike or substantially unlike?

A. They are substantially unlike.

AB'M WOOD.

Subscribed and sworn to before me this 25th April, 1870.

JOSEPH GUTMAN, Jr.,
Examiner, etc.

John Cook, a witness of lawful age, produced on the part of the defendant, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein, and being examined by Mr. Gifford, counsel for defendant, he deposes and says:

1. Q. What is your name, age, residence, and occupation?

A. My name is John Cook; I am 51 years of age; I reside at New York; I am a silver-ware manufacturer.

116 2. Q. How long have you been engaged in that manufacture, and state whether being so engaged has had the effect of attracting your attention to different designs for spoon and fork handles?

A. I have been in the business since 1835; this has had the effect of attracting my attention to some portion of the different designs of spoon and fork handles.

3. Q. Are you a member of any firm; and if yea, what firm, and where do they carry on business?

A. I am of the firm of John Cook, agent, No. 6 Liberty Place, New York.

4. Q. Please look at the spoon handle Complainant's Exhibit I, and the spoon handle Complainant's Exhibit C, and say whether the designs of those two handles are substantially the same or substantially different from each other?

A. Substantially different.

5. Q. Now compare spoon handle Complainant's Exhibit I, with spoon handle Complainant's Exhibit G, and say whether the designs of those two handles are substantially the same or substantially different from each other?

A. I should think they were substantially different as the sun and moon.

And being cross-examined by Mr. Blake, he deposes and says as follows:

6. Cross-q. For whom are your firm agents?

A. For George F. Platt.

7. Cross-q. Wherein does your agency consist?

A. In carrying on the manufacture of silver-ware.

8. Cross-q. Do you mean that you manufacture for them?

A. For them and any one else under their agency.

9. Cross-q. What is their business?

A. Bullion dealers, assayers, storekeepers, altogether.

117 10. Cross-q. What do you mean by storekeepers altogether?

A. Mr. Platt has a store of his own as well as this bullion office.

11. Cross-q. What sort of a store does he carry on; what does he sell?

A. Jewelry, etc., of every description.

12. Cross-q. Does he furnish you bullion to be manufactured, and do you manufacture it, sell it and account to him, or how do you carry on your business?

A. I buy the bullion of him, and pay him for it as my returns come in.

13. Cross-q. Does he share the profits of your business?

A. He has not yet

14. Cross-q. How long have you carried on business under this name?

A. Nearly four years.

15. Cross-q. Have you, during these four years, made to him returns of your sales, with accounts of your profits, and how often?

A. I take account of stock once a year and enter it on my stock-book.

16. Cross-q. Have you furnished him copies of your account of stock each year?

A. I have not; the last year I took account of stock I showed him a copy of the whole of it.

17. Cross-q. Has he any other thing to do with your business than that you buy bullion of him?

A. Nothing more than buy work of me and my charging him the same.

18. Cross-q. Why, then, do you call yourself his agent?

A. Because I am like a hen with the chickens when the hawk
118 is around, he hovers over me to give me protection.

19. Cross-q. Will you look at Exhibits D and G, and state whether you have ever sold goods of their pattern?

A. No, sir; not a dollar's worth.

20. Cross-q. Do you consider the patterns of those two exhibits substantially alike or substantially unlike?

A. They are unlike in the upper shoulders.

21. Cross-q. Are they in all other respects substantially alike?

A. No; they are not at the junction of the shank with the handle.

JOHN COOK, *Ag't.*

Subscribed and sworn to before me this 25th April, 1870.

JOSEPH GUTMAN, JR.,
Examiner, &c.

ALEXANDER WOODRUFF, a witness of lawful age, produced on the part of the defendant, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy herein, and being examined by Mr. Gifford, counsel for defendant, deposes and says:

1. Q. What is your name, age, residence, and occupation?

A. My name is Alexander Woodruff; I am 42 years of age; I reside at New York City; I am a silversmith.

2. Q. Are you in the employ of any concern; if yea, what one, and in what capacity?

A. I am in the employ of Lewis Kimball & Co., in the capacity of foreman.

119 3. Q. Foreman in the manufacture of silver-ware or in the sale of them, which?

A. In the manufacture of spoons and forks.

4. Q. How long have you been engaged in such business?

A. Twenty-six years.

5. Q. Where is the establishment of Lewis Kimball & Co?

A The salesroom is at 180 Broadway, the factory at 63 Prince street, N. Y.

6. Q. Please look at the spoon handle marked Complainant's Exhibit I, and the spoon handle, Complainant's Exhibit C, and state whether or not their designs are substantially alike or substantially unlike each other?

A. Unlike.

7. Q. Now compare spoon-handle Complainant's Exhibit I, with spoon

handle Complainant's Exhibit G, and state whether are substantially alike or substantially unlike?

A. Unlike.

And being cross-examined by Mr. Blake, he deposes and says as follows:

8. Cross-q. Of what department of the business have you charge?

A. Manufacturing spoons and forks.

9. Cross-q. Have you ever been a salesman?

A. No.

ALEXANDER WOODRUFF.

Subscribed and sworn to before me this 25th day of April, 1870.

JOSEPH GUTMAN, Jr.,
Examiner, &c.,

120 JOHN W. JOHNSON, a witness of lawful age, produced on the part of the defendant, having been by me first duly cautioned and sworn, to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein, and being examined by Mr. Gifford, counsel for defendant, deposes and says as follows:

1. Q. What is your name, age, residence, and occupation?

A. My name is John W. Johnson; I am 25 years of age; I reside in Plainfield, New Jersey; I am a dealer in silver-plated ware.

2. Q. Where are you engaged in that business?

A. At 14 John street, New York City?

3. Q. Please look at the spoon Complainant's Exhibit I, and spoon Complainant's Exhibit C, and say whether the designs of the handles of these two spoons are substantially the same or substantially different from each other?

A. Substantially different.

4. Q. Now please compare Complainant's Exhibit I, with Complainant's Exhibit G, and say whether the designs of those two spoon-handles are substantially the same or substantially different from each other?

A. Substantially different.

And being cross-examined, by Mr. Blake, he deposes and says as follows:

5. Cross-q. How long have you been in your present business?

A. About seven years.

6. Cross-q. In what branches of it have you been engaged?

A. Generally spoons, forks, and hollow-ware.

7. Cross-q. Have you ever sold any goods like Exhibits C and G?

A. I have not.

121 8. Cross-q. What do you consider to be the differences between Exhibit C and Exhibit I? State all of them.

A. Difference in the outline; also, in the tip, and the additional thread; there is a vast difference in the swell also.

9. Cross-q. What do you mean by the swell?

A. I mean the portion on the end of the handle.

J. W. JOHNSON.

Subscribed and sworn to, before me, this 25th day of April, 1870.

JOSEPH GUTMAN, Jr.,
Examiner, etc.

Examination adjourned to April 26, 1870, at 11 a. m.

N. Y., *April* 26, 1870—11 *a. m.*

Present, counsel as before.

Philo B. Gilbert, a witness of lawful age, produced on the part of the defendant, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy herein, and being examined by Mr. Gifford, of counsel for defendant, deposes and says as follows:

1. Q. What is your name, age, residence, and occupation?

A. My name is Philo B. Gilbert; I am 52 years of age; I reside at the Mansion House, Brooklyn, N. Y.; I am a silversmith.

2. Q. Did you learn the trade of a silversmith; and how long have you been at that business?

A. I did; I have been at the business since I was 14 years old.

3. Q. In whose employ are you now?

A. The Whiting Manufacturing Company.

122 4. Q. What kind of goods do they manufacture, and where are they located?

A. All kinds of silver goods; their store is No. 181 Broadway. Their factory is at North Attleboro, Massachusetts.

5. Q. State if the nature of your business has been such as to attract your attention, among other things, to different designs for spoon-handles and fork-handles.

A. It has; that is a branch of the business that I learned.

6. Q. Please compare the spoon-handle, Complainant's Exhibit I, with the spoon-handle, Complainant's Exhibit C, and state whether these two designs are substantially the same or substantially different from each other.

A. I should say the outline of the spoon was something like, but the filling up is entirely different.

7. Q. Now compare the spoon-handle, Complainant's Exhibit I, with the spoon-handle, Complainant's Exhibit G, and say whether the designs of these two are substantially different.

A. Substantially different.

8. Q. How is it with the outline of these two?

A. They are substantially different.

And being cross-examined by Mr. Blake, he deposes and says as follows:

9. Cross-q. Have you always been a silversmith?

A. I have.

10. Cross-q. Of what department of the business have you always had charge?

A. Generally of the fork and spoon business, but not always, because at one time I carried on the plate department as well, making hollow-ware.

11. Cross-q. Have you always been a manufacturer, or have you sometimes been a dealer?

123 A. I have manufactured my own goods and sold them, at retail, in some cases. I have always been a manufacturer until within the last year and a quarter.

12. Cross-q. Have your dealings generally been with the trade or with the public, purchasing in small quantities?

A. Generally with the trade.

13. Cross-q. Have you ever kept a shop where you sold your goods at retail?

N. Y., *April* 26, 1870—11 *a. m.*

Present, counsel as before.

Philo B. Gilbert, a witness of lawful age, produced on the part of the defendant, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy herein, and being examined by Mr. Gifford, of counsel for defendant, deposes and says as follows:

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9. Cross-q. Have you always been a silversmith?

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11. Cross-q. Have you always been a manufacturer, or have you sometimes been a dealer?

123 A. I have manufactured my own goods and sold them, at retail, in some cases. I have always been a manufacturer until within the last year and a quarter.

12. Cross-q. Have your dealings generally been with the trade or with the public, purchasing in small quantities?

A. Generally with the trade.

13. Cross-q. Have you ever kept a shop where you sold your goods at retail?

A. Do you mean a retail store?

14. Cross-q. I mean a store devoted to selling goods at retail?

A. Not altogether; I would say that I have sometimes sold goods at retail out of my office.

15. Cross-q. Has selling goods at retail been a considerable part of your business?

A. No, sir; a very small part of it.

16. Cross-q. When you sold goods at retail did you act as a salesman, or were the goods sold by your clerks?

A. In some cases I acted as salesman.

17. Cross-q. How was it generally?

A. If I was in and knew the parties I generally sold them myself.

18. Cross-q. Did you sell at retail any other goods than those of your own manufacture?

A. I may have done so in some very few cases.

19. Cross-q. Did you keep a stock to retail of goods other than those of your own manufacture?

A. No, sir.

20. Cross-q. When did you first see goods on sale of the pattern and material and like Exhibit C?

A. That would be hard to tell exactly.

124 21. Cross-q. Give us your best memory.

A. I should think it was some five years ago; it may be more or less.

22. Cross-q. What first called your attention to them?

A. The first time I saw them was at the store of McMullen & Hamilton, corner of Fulton and Water streets; I do not know that there was anything particular calling my attention to them; I saw the spoons lying in the cases.

23. Cross-q. Were you not then struck by their close resemblance to the Gorham Cottage pattern?

A. No, sir; I was not.

24. Cross-q. When, if ever, did you first notice their resemblance to the Gorham Cottage pattern?

A. I noticed at that time that there was a resemblance, but not a close resemblance.

25. Cross-q. Did you mention that resemblance to any one?

A. I do not remember that I did.

26. Cross q. Do you remember a conversation in regard to that resemblance with Mr. Adams, of the Gorham Manufacturing Co.?

A. No, sir.

27. Cross-q. Do you not remember that at the office of the Gorham Manufacturing Co. you told Mr. Adams that you considered it a very close infringement of the Cottage pattern, or something to that effect?

A. No; I have no recollection of anything of the kind.

28. Cross-q. Are you sure that you never had such or a similar conversation with Mr. Adams?

A. I have no recollection whatever of having a conversation with Mr. Adams about that pattern.

125 29. Cross-q. Are you willing to swear positively that you did not have such, or a similar conversation with Mr. Adams?

A. I am willing to swear that I have no recollection of any such conversation whatever.

30. Cross-q. Prior to your entering the service of the Whiting Manufacturing Co., your relations with the Gorham Manufacturing Co., and with Mr. Adams, were very cordial and friendly, were they not?

A. They were, certainly, and are so now as far as I know.

31. Cross-q. In former times you often talked with Mr. Adams, did you not, in regard to the imitations and the copying by others of the Gorham Manufacturing Co.'s designs and patterns?

A. Very likely I did; that is a matter of general conversation among silversmiths.

32. Cross-q. Can you name the houses most noted or known as copying the Gorham Manufacturing Co.'s designs or patterns?

(Objected to as assuming what has not been proved; that is, it assumes that there are houses noted or known as copying the designs or patterns of the Gorham Manufacturing Co.)

A. I do not wish to be understood as saying that the general conversation was in relation to the copying of the Gorham patterns altogether, any more than copying from any other house.

33. Cross-q. You are well acquainted, are you not, with the different designs and patterns of the Gorham Manufacturing Co.?

A. Some of them I am.

126 34. Cross-q. State how extensively they are copied or imitated from your experience in travelling and seeing stocks of different dealers.

(Objected to as irrelevant and immaterial.)

A. I do not know as I can answer that question.

35. Cross-q. You have seen imitations of some of their designs, have you not?

A. I may have; but I always look for new designs not copies.

36. Cross-q. What is the reputation of the Gorham Manufacturing Co. for originating beautiful and salable designs of silver-ware?

A. The best in the country.

37. Cross-q. Will you please look at Exhibits C and I, and state what the difference is in their designs?

A. The two threads on the upper shoulder of I terminate in a scroll, and there are two threads or a double thread continued down the shank; there is a roundness or fulness in the lower part of the upper shoulder. In Exhibit C the two threads in the upper shoulder do not unite in a scroll, and there is a single thread continued down the shank.

38. Cross-q. Have you stated in the last answer the reasons which lead you to deem the designs of these two exhibits substantially different?

A. I have stated some of the reasons.

39. Cross-q. In your experience as a silversmith have you become acquainted with many instances in which original designs put on the market by their designers are imitated by other houses?

A. Yes, sir.

40. Cross-q. Is not the frequency of this one of the greatest difficulties and annoyances of the silver business?

A. Yes, sir.

127 41. Cross-q. Will you look at Exhibit N, J. G., Jr., and state by whom it is manufactured and sold?

A. By the Whiting Manufacturing Co.

42. Cross-q. Will you look at Exhibit O, J. G., Jr., and state, if you know, by whom it is manufactured and sold?

A. I believe it to be manufactured by the Gorham Manufacturing Co.; but I do not know, as I never saw it done.

43. Cross-q. By what name do the Whiting Manufacturing Co. call Exhibit N, J. G., Jr.?

A. The Lotus pattern.

44. Cross-q. Do you know by what name the Gorham Manufacturing Co. call the pattern Exhibit O, J. G., Jr.?

A. It is known as the Lotus pattern.

45. Cross-q. State whether or not, in your judgment, the Lotus pattern of the Whiting Manufacturing Co. is a copy or imitation of the Lotus pattern of Gorham Manufacturing Co.?

A. No, sir, it is not; the Gorham Lotus has three leaves only, whereas the Whiting Lotus has five, and the filling up of the shank is materially different.

46. Cross-q. Is the difference between the Whiting Manufacturing Co.'s Lotus pattern and the Gorham Manufacturing Co.'s Lotus pattern greater or less than the difference between the pattern of Exhibit I and the pattern of Exhibit C, in your judgment?

A. I should say the difference was greater.

P. B. GILBERT.

Subscribed and sworn to before me this 26th day of April, 1870.

JOSEPH GUTMAN, Jr.,
Examiner, etc.

128 **Henry Ball**, a witness of lawful age, produced on the part of the defendant, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy herein, and being examined by Mr. Gifford, deposes and says as follows:

1. Q. What is your name, age, residence, and occupation?

A. My name is Henry Ball; I am 53 years of age; I reside at New York City; I am a silversmith and jeweller.

2. Q. What is the name of your firm, and where is your place of business?

A. Ball, Black & Co., Nos. 565 and 567 Broadway, New York City.

3. Q. How long have you been in that business?

A. Thirty-eight years.

4. Q. Have you participated in the business of selling goods?

A. I have.

5. Q. Please look at the spoon, Complainant's Exhibit I, and the spoon, Complainant's Exhibit C, and state whether the designs of the handles of those spoons are substantially like or substantially unlike each other.

A. I should say they were unlike each other; there is a similarity.

6. Q. What do you mean by there being a similarity?

A. A similarity in their outline, but the die is very different as far as I am able to judge.

7. Q. Now, compare Complainant's Exhibit I with Complainant's Exhibit G, and state whether or not the designs of those two handles are substantially the same or substantially different from each other.

A. Different.

129 And being cross-examined by Mr. Blake, he deposes and says:

8. Cross-q. Will you please to point out what you consider to be the difference between the designs of Exhibits G and I.

A. There is quite a difference in the form of the handles, and there appear to be three grooves in the one and but two in the other; the one has two lines and the other has but one; at the head of the handle on the one the scrolls turn out, and on the other they turn in; they seem to be very different. That is all that I have to say about it.

9. Cross-q. What do you find to be the differences between the design of Exhibit C and Exhibit I?

A. A very like difference between these as in the other case; the one has two grooves and the other has but one.

10. Cross-q. State, if you please, how common are imitations of original designs in the silver and plated business.

A. It is quite common for them to imitate and to copy, but I should consider this a very poor copy of the other.

11. Cross-q. Is not the frequency of the imitation of original designs in silver and plate a source of great inconvenience and loss in the silver business?

(Objected to as irrelevant and immaterial, and because to prove a general practice of stealing by somebody cannot establish the charge of theft against a certain individual.)

A. I have never experienced it.

12. Cross-q. Did your house ever deal with the Gorham Manufacturing Co.?

A. Yes, sir.

13. Cross-q. Do they deal with them now?

130 A. No; we have not recently?

14. Cross-q. How long is it since you dealt with them?

A. It may be two years.

15. Cross-q. Why did you cease to deal with them?

A. One of my partners was opposed to our continuing with that house.

16. Cross-q. Is that your whole reason?

A. We had an arrangement with another house, and my partner was opposed to our dividing the business.

17. Cross-q. What is the name of that other house?

A. John R. Wendt & Co.

18. Cross-q. You have the exclusive sale of John R. Wendt & Co.'s goods in the city of New York, have you not?

A. We have.

19. Cross-q. How long has that arrangement existed?

A. Eleven years.

20. Cross-q. His place of business is in Ball & Black's building, is it not?

A. Yes.

21. Cross-q. Before you ceased dealing with the Gorham Manufacturing Company, did they not complain that your house sold copies or imitations of their patterns?

A. I have no knowledge of it.

22. Cross-q. Was it not on this ground that the Gorham Manufacturing Company declined to deal further with your house?

(Objected to because there is no "this ground" proved, or shown to exist.)

131 A. I was not aware that they declined dealing with us. I was not even told that they would not sell us. I ceased going there because my partner opposed it.

23. Cross-q. Has your house, in point of fact, ever sold goods copying or imitating the patterns or designs of the Gorham Manufacturing Company?

A. I am not aware of it, sir.

24. Cross-q. Are you, in the course of your business, constantly informed in regard to all the different patterns of goods in silver and plate sold by your house?

A. Yes, sir.

25. Cross-q. Have you ever sold, or are you now selling, goods of the pattern of Exhibit D?

A. I think not.

26. Cross-q. Have you ever sold, or are you now selling, goods of the pattern of Exhibit G?

A. I think not.

27. Cross-q. Did your house, in 1867, import plated goods from Buckley & Son, of Birmingham, England?

A. Yes; we have imported from them for 35 years.

28. Cross-q. Do you not remember expressing the opinion, in 1867, that the goods then imported by you from Buckley & Son were close imitations or copies, or nearly resembling the goods of the Gorham Manufacturing Company.?

A. I have never made such an assertion. I have never seen any patterns from Buckley that in any degree could be considered copies of Mr. Gorham's.

It is hereby stipulated between the parties that, after final judgment in this cause in the circuit court of the United States, and in the Supreme
Court, in case the suit shall be appealed, Exhibit P, J. G., Jr.,
132 may be taken from the clerk's files and returned to the plaintiffs—
this in consequence of the value of the exhibit.

CHARLES F. BLAKE,
Of Counsel for Compl'ts.
GEO. GIFFORD,
Defendant's Sol'r.

29. Cross-q. Were not the goods imported by you in 1867, from Buckley & Son, substantially, in pattern or design, like the electro-plated goods of the Gorham Manufacturing Company?

A. I am not aware that we ever had a pattern that was ever copied from one of them; neither do I think that any identical copy has ever been made.

30. Cross-q. Look now at Exhibit P, and state whether or not your house now has, or ever has had, on sale goods in pattern and design substantially like it.

(Objected to as calling for an immaterial and irrelevant answer.)

A. I could not say that we ever had one precisely like it. We had a great variety of dishes of similar pattern. I do not think we ever had one exactly like it.

31. Cross q. Look at the figure which supports the bowl, and state whether or not a figure substantially like it has been used in fruit-stands sold by your house.

(Objected to as irrelevant and immaterial.)

A. I do not know. I do not think that the same figure has been, unless Mr. Gorham has copied some of our figures, which I suppose he has done often.

32. Cross-q. What, and how many figures of yours has Mr. Gorham copied?

(Objected to as immaterial and irrelevant.)

A. I do not know what. I know my partner forbids Mr. Gor-
133 ham's partner coming to our place. That is the principal reason
why we do not deal with their house, because he thought they
came there to copy our patterns.

33. Cross-q. What is the name of your partner, and what is the name of the partner of the Gorham Company whom you forbade coming to the store?

A. Mr. Black is my partner; Mr. Wilkinson, I think, was the name of the Gorham Co.'s partner whom he forbade.

34. Cross-q. Can you name one figure or design of yours which the Gorham Manufacturing Company has copied?

A. I cannot name any special figure. I heard Mr. Wendt say that Mr. Wilkinson had carried away a great many of his patterns when he left him. Wilkinson was formerly with him.

35. Cross-q. Look now at Exhibit P, at the small figures at the circumference of the bowl, and state whether or not those figures, or figures substantially like them, are or have been sold or used on goods sold by your house?

(Objected to as calling for immaterial matter.)

A. I could not say that we have. We have a great variety of figures. I could not say that we have that identical figure.

36. Cross-q. Can you say that you have not a figure substantially like it?

(Objected to as immaterial and irrelevant.)

A. I do not recollect one exactly like it. We may have a figure similar.

HENRY BALL.

Subscribed and sworn to before me this 26th day of April, 1870.

JOSEPH GUTMAN, Jr.,
Examiner, etc.

134 John H. Woodward, a witness of lawful age, produced on the part of the defendant, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy herein, and being examined by Mr. Gifford, counsel for defendant, deposes and says as follows:

1. Q. What is your name, age, residence, and occupation?

A. My name is John H. Woodward; I am 54 years of age; I reside in the city of New York; I am a silversmith.

2. Q. Did you practically learn the business of a silversmith, and how long have you been engaged therein?

A. I did; I have been engaged therein 35 years.

3. Q. Has your relation to that business been such as to cause you to come in contact with, and notice, different designs of spoon and fork handles?

A. It has.

4. Q. Please compare Complainant's Exhibit I with Complainant's Exhibit C, and state whether the designs of those two handles are substantially the same or substantially different from each other.

A. Substantially different from each other.

5. Q. Please mention some of the differences in those designs.

A. In Exhibit I, I notice a double thread or moulding extending from the rear end of the bowl running along up the shank, forming a scroll-head, the double thread or moulding extending to the rear end of the handle, there parting and forming a scroll-head or rosette. On the reverse side—the back part—I also notice a double thread or moulding which starts from the heel of the bowl, the centre moulding of which forms a scroll-head. On each side of the scroll head there are two ornaments which I should style dart-heads. This thread or moulding runs up to the shank as on the front, and continues along to the end of
135 the handle where the scroll-heads separate. In Exhibit C, I notice
that the thread or moulding, which is single, commences at the rear end of the bowl, with what I should term a figure representing a Gothic arch, this thread or moulding running along the shank in one

continuous line entirely around the length of the spoon-handle. Commencing at the shoulder, I observe another line or moulding commencing with a scroll-head, which turns outward, running along to quite near the extremity of the spoon-handle, finishing with a scroll-head which turns inward. At the broadest part I notice another line connecting with the thread ending at the scroll-head, thereby forming three lines at the broadest part of the spoon-handle. On the reverse side I find this outer line, which is continuous and unbroken, commencing at the heel of the bowl with a figure representing a Gothic arch; in all other respects the reverse is the fac-simile of the front. The tip on Exhibt C represents what I would term a bar. I observe in Exhibit I, at the shank, it is quite bold in thickness, gradually diminishing until it reaches the widest part of the handle. In Exhibit C, I do not find it so.

6 .Q. Now please compare Complainant's Exhibit I with Complainant's Exhibit G, and state whether the designs of the handles of these spoons are substantially alike or substantially unlike each other.

A. Substantially and entirely unlike.

And being cross-examined by Mr. Blake, of counsel for complainants, he deposes and says:

7. Cross-q. Have you had any experience in the silver retail business?

A. Very slightly.

JOHN H. WOODWARD.

Subscribed and sworn to before me, this 26th April, 1870.

JOSEPH GUTMAN, Jr.,
Examiner, &c.

136 Edward S. Renwick, a witness of lawful age, produced on the part of the defendant, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy herein, and being examined by Mr. Gifford, counsel for defendant, deposes and says as follows:

1. Q. What is your name, age, residence, and occupation?

A. My name is Edward S. Renwick; I am 47 years of age; I reside at Milburn New Jersey; my place of business being the city of New York; I am occupied principally in soliciting patents, and in acting as expert in the trials of patent causes in the United States courts.

2. Q. Have you read and examined Exhibit No. 8, being a certified copy of the letters-patent to complainants?

A. I have.

3. Q. Please look at Complainant's Exhibit C, and state whether or not the design of the handle of that exhibit is substantially different from the design described and represented in the copy of complainant's patent, Exhibit 8; and if you say it is, then give your reason for such conclusion.

A. In my opinion the design of the handle of Exhibit C, is substantially different from the design described and represented in the copy of complainant's patent, Exhibit 8. There is a general resemblance between the outline of Exhibit C, and the outline of the design of handle, described and represented in Exhibit 8, but the former exhibit differs substantially in design from what is described and represented in Exhibit 8, in the following particulars: In the design, Exhibit 8, the outline at the palm or leaf of the spoon handle has the form of a portion of a trefoil, whereas in Exhibit C the outline of the corresponding portion of the handle has the form of a Gothic arch; in the design, Ex-

hibit 8, the boundary of the ornamental part of the design is
137 made up of a thread, which is broken at the shoulders, at the end of the handle, and at the junction of the handle with the bowl; in Exhibit C the boundary of the ornamental portion of the design is formed of a continuous thread, which is not broken at the shoulders, or at the end of the handle, or at the junction with the bowl, where the thread has the form of a Gothic arch, which is not found in the design represented and described as Exhibit 8. In the design represented in Exhibit 8, the bounding thread is turned at the shoulders to form rosettes, having the appearance as if formed of two parts twisted in together, while no such appearance is found in the boundary thread of Exhibit C at the shoulders. In the design represented in Exhibit 8, the stem of the handle between the shoulders and the bowl, has a second thread upon it which is parallel with and inside of the boundary thread. No such second thread is found in Exhibit C. In the design represented in Exhibit 8, the leaf or palm of the handle has two second threads inside of the boundary threads, which inner threads, towards the end of the handle, are turned outwards from each other so as to form diverging scrolls. In Exhibit C there are two inner threads in the palm of the handle; but these inner threads, as they approach the end of the handle, instead of being turned outwards as in Exhibit 8, are turned inwards and form reëntering scrolls. In Exhibit 8, the scrolls of the inner threads, at the end of the handle, form a part of the outline of the handle. In Exhibit C the scrolls of the inner threads do not participate in any manner in forming the outline of the handle. In the design represented in Exhibit 8, the scrolls of the inner threads form a part of the boundary of the handle. In Exhibit C the scrolls being turned inwards form no part of that boundary, but are entirely inside of it. In the design represented in Exhibit 8, the extreme end of the handle is formed by a tip which is inserted between the two scrolls. In Exhibit C, the extreme end is formed by the boundary thread which
138 extends around the residue of the handle. In Exhibit C, there is a shield-formed figure inserted between the scrolls and the boundary thread. In the design represented in Exhibit 8 no such figure is found, and no figure of similar configuration could be inserted, because of the difference in the configuration of the scrolls and boundary threads. In Exhibit C there is at each side of the scroll of the inner thread a short piece of a third thread, nothing of which kind is found in the design represented in Exhibit 8. In the design represented as Exhibit 8 the inner thread of the palm or leaf of the handle is of such configuration as to abut against the scroll or rosette of the outer or boundary thread, and to give it the appearance of a continuation of the boundary thread of the stem of the handle passed beneath the scroll which terminates the boundary thread of the leaf of the handle at the shoulder. No such configuration is found in Exhibit C, but the inner thread in that exhibit is turned into a scroll and rosette, and has no appearance of being a continuation of the boundary thread of the stem of the handle. In the design represented in Exhibit 8, the surface of the portion between the threads is swelled between the shoulders, and this swell is gradually flattened towards the widest part of the handle so that the swell at the broadest part of the handle is substantially different in appearance from the swell at the shoulders. In Exhibit C the portion between the threads is slightly swelled, but the swell is substantially the same throughout the leaf of the handle from its shoulders to its broadest part. In the design represented in Exhibit 8,

the inner threads passing along the stem of the handle unite in a swell or boss in the vicinity of the bowl. No such swell or boss is found in Exhibit C. In the lower surface of the design, represented in Exhibit 8, a small raised leaf is inserted between the boundary thread at each side and the inner thread at the junction of the stem with the bowl. No such leaves are found in Exhibit C.

4. Q. Please look at Complainant's Exhibit G, and say whether
139 the differences which you have pointed out in your last answer,
between the design described and represented in Exhibit 8, and the design of the spoon handle, Exhibit C, also exist between the design represented and described in Exhibit 8, and the design of the spoon handle, Complainant's Exhibit G; and also state whether there is still another difference between the design of Exhibit 8 and the design of Exhibit G.

A. The same differences that I have stated as existing between the design of handle, Exhibit C, and the design represented and described as Exhibit 8, exist also between the design of handle of Exhibit G and the design of handle represented and described in Exhibit 8. There is also an additional difference between the design of the handle, Exhibit G, and the design of the handle represented and described in Exhibit 8. In Exhibit 8 the palm or enlarged part of the handle spreads out progressively from the shoulders until the widest portion of the handle is reached. In Exhibit G the corresponding part of the handle is narrowed for a certain distance, and is then spread outward so that the enlarged part of the handle of Exhibit G, considered by itself, has somewhat the outline of a figure 8 which has been squeezed sideways.

5. Q. Do you think that a person with reasonable attention would be likely to mistake the handle, Exhibit C, or the handle, Exhibit G, for the handle Exhibit I? I mean with reference to the designs.

A. I think not.

And, being cross-examined by Mr. Blake, counsel for complainant, he deposes and says:

6. Cross-q. What experience have you had in considering the differences between designs?

A. In the course of my business I have had to prepare applications for patents for designs, and I have frequently compared designs together, but I am not a designer by profession.

140 7. Cross-q. Have you ever been concerned in a litigated question between designs, whether before the Patent Office or the courts?

A. I never have.

8. Cross-q. Do you consider the designs of Exhibit F and Exhibit C to be substantially alike, or substantially unlike?

A. As a whole they are substantially alike.

9. Cross-q. Do you consider the designs of Exhibit F and Exhibit G to be substantially alike or substantially unlike, in the sense in which these words are used by you in your direct examination?

A. Considered as a whole they are substantially unlike, but the ornamentation of the two exhibits is substantially alike. In other words, they are substantially alike in all respects but outline.

10. Cross-q. If Exhibit F were in ornamentation in all respects like the design described in Exhibit 8, except that the rosettes at the shoulder were placed where they are in Exhibit F, should you consider that design substantially like or substantially unlike Exhibit 8?

A. I should say it was substantially unlike the design of the handle represented in Exhibit 8.

11. Cross-q. If Exhibit F were in ornamentation in all respects like the design described in Exhibit 8, except that it had one thread on each side of the stem instead of two, would you consider that design substantially like or substantially unlike the design described in Exhibit 8?

A. I should consider it substantially unlike the design described in Exhibit 8.

E. S. RENWICK.

Subscribed and sworn to before me this 26th April, 1870.

JOSEPH GUTMAN, Jr.,
Examiner, &c.

141 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on the 26th day of August, in the year of our Lord one thousand eight hundred and seventy.

Present, the Honorable Samuel Blatchford, dist. judge.

Gorham Manufacturing Company
vs.
George C. White.

The above-entitled cause coming on to be heard on final hearing on pleadings & proof, Mr. C. F. Blake is heard on part of complainant; Mr. George Gifford is heard on part of defendant; Mr. C. M. Keller is heard on part of complainant.

Cur. ado. vult.

142

143 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Saturday, the 22d day of October, in the year of our Lord one thousand eight hundred and seventy.

Present, the Honorable Samuel Blatchford, dist. judge.

The Gorham M'f'g Co.
vs.
Geo. C. White.

This cause having been heretofore brought to a hearing upon the pleadings and proofs therein, and having been argued by C. M. Keller and C. F. Blake for the complainants, and by George G*l*ifford for the defendants, and due deliberation had thereon, it is now, on motion of George *Cl*ifford, for the said defendant, ordered, adjudged, and decreed, and this court, by virtue of the power and authority therein vested, doth hereby order, adjudge, determine, and decree that the said complainant's bill filed be, and the same is hereby, dismissed with costs.

(Sign'd) SAM'L BLATCHFORD.

144

145 Circuit court of the United States, second circuit and southern district of New York.

GORHAM MANUFACTURING COMPANY, APPELLANTS,
vs.
GEORGE C. WHITE, APPELLEE.
} In equity.

To the honorable the Supreme Court of the United States:

The appeal of the Gorham Manufacturing Company, the above-named appellants, respectfully showeth that, on the *on the* 21st day of March, A. D. 1867, the above-named Gorham Manufacturing Company filed their bill of complaint in the circuit court of the United States for the second circuit and the southern district of New York against the above-named George C. White, in a suit in equity, to enjoin and restrain the said George C. White from infringing certain letters-patent of the United States, granted to John Gorham, Gorham Thurber, and Lewis Dexter, jr., on the 16th day of July, 1861, for a new design for spoon 146 and fork handles, and owned by the said Gorham Manufacturing Company, and also for accounting and paying over of the profits realized by him by reason of such infringement, and that a subpœna, issued out of said circuit court, was served on said White on the 23d day of March, 1867; that the said defendant filed his answer to said bill of complaint, and the complainants replied thereto. Whereupon such proceedings were had in said cause that, on the 22d day of October, A. D. 1870, a final decree was entered in said circuit court, wherein it was, in substance, adjudged that the said bill of complaint be dismissed with costs; which said judgment and decree is, as these appellants are advised, erroneous and ought to be reversed.

Wherefore these appellant' appeal from the whole of said decree of said circuit court to the Supreme Court of the United States, and respectfully pray that the said decree of said circuit court and the bill of complaint, answer, replications, depositions, evidence, and proceedings in said cause may be sent to the Supreme Court of the United 147 States without delay, and *and* that the said Supreme Court will proceed to hear the cause anew, and that the said decree of the circuit court and every part thereof may be reversed, or such other decree made as to the said Supreme Court shall seem just.

Dated New York, November , 1870.

GORHAM M'F'G CO.,
By their att'ys, KELLER & BLAKE.

KELLER & BLAKE,
Sol'rs for Appellants.

(Endorsed:) United States district court, southern district of New York. In equity. Gorham Manufacturing Company vs. George C. White. Appeal to the Supreme Court. Keller & Blake, sol'rs for appellants.

Allowed Nov. 29, 1870.

SAM'L BLATCHFORD,
District Judge.

148

149 Circuit court of the United States for the southern district of New York.

GORHAM MANUFACTURING COMPANY
vs.
GEORGE C. WHITE.
} In equity.

Know all men by these presents that we, The Gorham Manufacturing Company & John P. Fellows and James E. Weir, both of the city, county, and State of New York, are firmly bound unto George C. White in the sum of five hundred dollars, to be paid to the said George C. White, his executors, administrators, or assigns, for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, administrators, and executors, jointly and severally, by these presents, sealed with our seals, and dated the day of November, one thousand eight hundred and seventy.

Whereas the above-named Gorham Manufacturing Company, complainant in the above-entitled cause, has prosecuted an appeal 150 to the Supreme Court of the United States out of this court to reverse the decree rendered in the above-entitled cause, and entered with the clerk of this court, on the 22d day of October, one thousand eight hundred and seventy, by which decree it was adjudged that the bill of complaint of the said Gorham Manufacturing Company be dismissed with costs:

Now, therefore, the condition of this obligation is such that, if the above-named Gorham Manufacturing Company, complainant as aforesaid, shall prosecute their said appeal to effect, and shall pay all damages and costs if the said decree shall be affirmed, then this obligation to be void; otherwise to remain in full force and virtue.

C. C. ADAMS, JR. [S.]
JNO. P. FELLOWS. [S.]
JAMES E. WEIR. [S.]

Sealed and delivered and taken and acknowledged this 22d day of Nov., 1870, before me.

JOHN A. SHIELDS,
U. S. Comm'r.

151 UNITED STATES OF AMERICA,
Southern District of New York, ss:

John P. Fellows, being duly sworn, deposes and says that he is a freeholder residing in the city of New York, and that he is worth the sum of five hundred dollars over and above his just debts and liabilities.

JNO. P. FELLOWS.

Sworn to before me this 22d day of Nov., 1870.

JOHN A. SHIELDS,
U. S. Commissioner.

UNITED STATES OF AMERICA,
Southern Dist. of New York, ss:

James E. Weir, being duly sworn, deposes and says that he is a freeholder residing in the city of New York, and that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

JAS. E. WEIR.

Sworn to before me this 22d day of Nov., 1870.

JOHN A. SHIELDS,
U. S. Commissioner.

152 I approve the sufficiency of the sureties to the within bond.
Dated New York, Nov. 29, 1870.

SAM'L BLATCHFORD,
District Judge.

(Endorsed:) U. S. circuit court, southern dist. of New York. In equity. Gorham Manufacturing Company vs. George C. White. Bond on appeal. Keller & Blake, sol's for appellants.

153 By the Honorable Samuel Blatchford, one of the judges of the circuit court of the United States for the southern district of New York in the second circuit, to George C. White, appellee:

Whereas, the Gorham Manufacturing Company lately appealed to the Supreme Court of the United States from a decree rendered in the circuit court of the United States for the second circuit and southern district of New York, made in favor of you in a suit brought by the said Gorham Manufacturing Company against you, the said George C. White, and has filed the security required by law:

You are hereby cited to appear before the said Supreme Court of the United States at the City of Washington, on the first Monday of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of New York, in the second
154 circuit, this 29th day of November, in the year of our Lord one
thousand eight hundred and seventy, and of the independence of
the United States the ninety-fifth.

SAM'L BLATCHFORD,
Dist. Judge.

(Endorsed:) Supreme Court of the United States. Gorham Manufacturing Company, appellants, vs. George C. White. Citation on appeal.

Due & timely service of the within citation admitted.
November 30th, 1870.

GEO. GLIFFORD,
Sol'r for Appellee.

155 UNITED STATES OF AMERICA,
Southern District of New York, *ss:*

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to 154, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Gorham Manufacturing Company against George C. White as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 7th day of Dec'r, in the year of our

Lord one thousand eight hundred and seventy, and of the independence of the said United States the ninety-fifth.

[SEAL.] KENNETH G. WHITE,
Clerk.

[5-ct. int. rev. stamp, canceled.]

(Indorsement on cover:) No. 372. The Gorham Manufacturing Company, appellant, vs. George C. White. S. New York, C. C. U. S. Filed 9th December, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 168.

DECEMBER TERM, 1871.

THE GORHAM MANUFACTURING COMPANY, APPELLANT,

VS.

GEORGE S. WHITE.

Exhibit No. 6.—J. G. J., examiner.

No. 2,551.] [Design.

The United States of America to all to whom these letters-patent shall come:

Whereas, Le Roy S. White, of Waterbury, Connecticut, has alleged that he has invented a new and useful design for the handle of a fork or spoon, which he states has not been known or used before such invention, has made oath that he is a citizen of the United States; that he does verily believe that he is the original and first inventor or discoverer of the said design, and that the same has not, to the best of his knowledge and belief, been previously known or used; has paid into the Treasury of the United States, the sum of fifteen dollars, and presented a petition to the Commissioner of Patents, praying that a patent may be issued therefor:

2 These are therefore to grant, according to law, to the said Le Roy S. White, his heirs, administrators, or assigns, for the term of seven years, from the fifteenth day of January, one thousand eight hundred and sixty-seven, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said design, a description whereof is given in the schedule hereunto annexed, and made a part of these presents.

In testimony whereof I have caused these letters to be made patent, and the seal of the Patent Office to be hereunto affixed.

Given under my hand, at the city of Washington, this fifteenth day [SEAL.] of January, in the year of our Lord one thousand eight hundred and sixty-seven, and of the independence of the United States of America the ninety-first.

W. T. OTTO,
Acting Secretary of the Interior.

Countersigned and sealed with the seal of the Patent Office.

T. C. THEAKER,
Commissioner of Patents.

3 UNITED STATES PATENT OFFICE.

Le Roy S. White, of Waterbury, Connecticut. Design No. 2,551, dated January 15, 1867.

Design for the handle of a fork or spoon.

The schedule referred to in these letters-patent, and making part of the same.

To all whom it may concern:

Be it known that I, L. S. White, of Waterbury, in the county of New Haven, and State of Connecticut, have invented a new and improved design for spoon handles, fork handles, &c.; and I do hereby declare that the following is a full, clear, and exact description thereof, reference being had to the accompanying drawings, forming part of this specification, of which—

Figure 1 is a front view, and Figure 2 is a rear view of the same. Similar letters of reference indicate like parts.

The handle is made with a comparatively long and narrow stem or
shank, and with low, rounded shoulders upon its side edges, at
4 the points where the said handle begins to expand or broaden,
and terminates with a small rounded projection at the extreme
end. Along the edges of the front and rear sides of the handle is formed a single line, A, following the contour of the handle, and extending down upon the head of the fork or spoon in the form of a rounded angle, B, this angle extending further down upon the rear than upon the front side, of said head. Along the sides of the broader part of the handle is formed a second line, C, terminating at each end with an inward curve and bead, as shown in Fig's 1 and 2. In the space between the end curves of the lines C and the line A, where it follows the outline of the rounded projection, upon the end of the handle, is formed a shield, D, having a central longitudinal rib or raised line, as shown. E are short curved lines, starting from the end curves of the lines C, and uniting with said lines at the broadest part of the handle, as shown in Fig's 1 and 2.

5 I claim as new, and desire to secure by letters-patent the design for fork handles, spoon handles, &c., herein shown and described.

LE ROY S. WHITE.

Witnesses:
DAVID B. HAMILTON.
CHARLES A. HAMILTON.

6 Supreme Court of the United States. December term, 1871.

THE GORHAM MANUFACTURING COMPANY, appellant,
vs.
GEORGE C. WHITE.
No. 168.

Exhibit No. 7.—J. G. J., ex'r.

No. 2992.] [Design.

The United States of America to all to whom these letters-patent shall come:

Whereas Le Roy S. White, of Waterbury, Connecticut, has alleged that he has invented a new and useful design for a spoon or fork handle, and has made oath that he is a citizen of the United States; that he verily believes he is the original and first inventor or discoverer of the said design, and that the same hath not, to his knowledge and belief, been previously known or used; has paid into the Treasury of the United States the sum of thirty dollars, and presented a petition to the Commissioner of Patents, praying that a patent may be issued therefor:

These are therefore to grant to the said Le Roy S. White, his
7 executors, administrators, or assigns, for the term of fourteen
years from the thirty-first day of March, one thousand eight hundred and sixty-eight, the full and exclusive and liberty of making, using, and vending to others to be used, the said design, a description whereof is given in the annexed schedule, and made a part of these presents.

In testimony whereof I have caused these letters to be made patent, and the seal of the Patent Office to be hereunto affixed.

[SEAL.] Given under my hand at the city of Washington, this thirty-first day of March, in the year of our Lord one thousand eight hundred and sixty-eight, and of the independence of the United States of America the ninety-second.

W. T. OTTO,
Acting Secretary of the Interior.

Countersigned and sealed with the seal of the Patent Office.

A. M. STOUT,
Acting Commissioner of Patents.

8 UNITED STATES PATENT OFFICE:

Le Roy S. White, of Waterbury, Connecticut. Design No. 2,992, dated March 31, 1868.

Design for a spoon or fork handle.

The schedule referred to in these letters-patent, and making part of the same.

To all whom it may concern:

Be it known that I, Le Roy S. White, of Waterbury, in the county of New Haven, and State of Connecticut, have invented a new and improved design for spoon, fork, and other handles, of which the following is a full, clear, and exact description, reference being had to the accompanying drawing, forming part of this specification, and which represents a front view of a spoon or other handle, or same in part, fashioned to embrace my new design:

The stem, or shank portion A of the handle, may be of any suitable
length, and is made with two rounded formations along its side
9 edges, constituting a raised border, *a*, that follows the contour of
the whole handle, and is the same, front and rear of the latter, as are the several ornamental configurations on or of the handle. The stem, or shank portion A, forms its junction with the upper or expanded portion of the handle by swell *b* on either side, of convex shape, that gradually merge or meet concave lines or boundaries *c* which give a narrowed configuration to the expanded portion of the handle above the swells *b*, and afterwards, or further up, where the boundaries are continued by convex lines *d*, a wider form, such spread-out portion

finally terminating in a rounded or arched projection, *e*, at the top or extreme end. Along either side of the broader portion B of the handle, within the line or border *a*, is a second line, *f*, following, for the most part, the contour of the border, but terminating at each end with an inward curve and bead, as shown in the drawing. In the space between
the upper end curves of the lines *f* and border, *a*, where it follows
10 the outline of the projection *e* upon the end of the handle, is formed
a shield, *g*, having a central longitudinal rib or raised line, as shown. There are also short, curved lines *h* joining the end curves of the lines *f* with the broadest part of the handle, as represented in the drawing.

What is here claimed and desired to be secured by letters-patent, is the design for fork, spoon, or other handles, as herein shown and described.

LE ROY S. WHITE.

Witnesses:
C. A. HAMILTON.
GEO. E. BERRY.

U. S. Supreme Court.

THE GORHAM M'F'G CO., APPELLANTS,
vs.
GEO. C. WHITE, APPELLEE.
} No. 168.

We hereby consent that defendant's Exhibits 6 and 7, in the above-entitled cause, be printed and added to the record thereof.

GEO. GIFFORD,
For Appellee.
CHARLES M. KELLER,
For Appellant.

11 (Endorsed:) Sup. Court U. S. 1871, Dec. term. No. 168. Gorham Manufacturing Company, appellant, vs. Geo. C. White. Agreement of counsel to print Exhibits Nos. 6 and 7. Filed 15th January, 1872.

GORHAM MANUFACTURING COMPANY,
Appellants,

vs.

GEORGE C. WHITE,
Appellee.

IN THE

Supreme Court of the United States,

ON APPEAL

FROM THE

Circuit Court of the United States, for the Souther
District of New York.

C. M. KELLER,
C. F. BLAKE,
For Appellants.

ANSON HERRICK'S SONS, Printers, 16 Spruce Street, New York.

Supreme Court of the United States.

GORHAM MANUFACTURING COMPANY,
Appellants,
vs.
GEORGE C. WHITE,
Appellee.

The bill in this suit is brought upon Letters Patent granted to John Gorham, Gorham Thurber, and Lewis Dexter, Jr., for a new Design for Spoon and Fork Handles. It is in the usual form, and sets forth the grant of the patent, its assignment to the complainants, and the infringement by the defendants, and prays for an injunction and acount.

The Answer admits the grant of the patent and denies infringement. And all the testimony in the case is addressed to the issue thus raised.

The complainants, to prove the substantial identity of their design with that of the infringing goods, called as witnesses Edward C. Moore, C. T. Cooke, and James H. Whitehouse, of Tiffany & Co., New York; E. W. Sperry, of the Redfield & Rice Manufacturing Co.; M. S. Smith, of M. S. Smith & Co., of Detroit; N. Matson, of N. Matson & Co., of Milwaukee and Chicago; T. B. Starr, of Starr & Marcus, of New York; E. V. Haughwout, of E. V. Haughwout & Co., of New York; H. H. & James A. Hayden, of New York, Boston, and Waterbury; A. Babcock, of Reed & Barton, of Taunton; Jas. B. Church, of Hall, Elton & Co., of New York; J. T. Bailey, of Bailey & Co., Philadelphia; H. D. Morse, of Crosby, Morse, & Foss, of Boston; E. T. Bemis, of Bigelow & Kennard, Boston; and others.

Of these gentlemen, Mr. Tiffany says: "I know them, with a very few exceptions, and I consider them representative men in the trade. I think it would have been impossible to have selected from the whole trade a list more unexceptionable in every respect."

P. 44, Int. 11.

The design patented is well known in the market as the "Cottage Pattern." Mr. Starr, of Starr & Marcus, says that they sell "of this pattern about double the amount of any one pattern," and that he considers it "the best pattern made at the present day."

P. 18, Ints. 5 and 6.

And that he "should value the Cottage pattern, if exclusively my own, at fifty thousand dollars."

P. 18, Int. 11.

Mr. Cooke, of Tiffany & Co., says the pattern struck him "as being the handsomest, best, and most saleable that I had ever seen, in my opinion, and I predicted for it a great success."

P. 12, Int. 9.

Mr. Smith, of Detroit, says, "It is one of the most popular of my patterns, and I have very nearly as much of it as of any other pattern of silver."

P. 16, Int. 3.

Mr. Haughwout calls it "a very saleable pattern."

P. 21, Int. 8.

Mr. H. H. Hayden says, "It is considered a very desirable pattern, and very saleable."

P 23, Int. 5.

Mr. Joseph T. Bailey, of Philadelphia, says, "I believe it to be the most successful plain pattern which has ever been made."

P. 36, Int. 8.

Mr. James A. Hayden says, "I think it one of the most popular patterns that has ever been made; and from my general observation for the last two years, I should think there had been more sold of that pattern than of any new design previously introduced." And he made two attempts to obtain a license to use it for his house.

P. 42, Int. 5.

Mr. Tiffany says: "It is decidedly a meritorious pattern, a very popular pattern. My opinion of it at present is, that it is the best of all plain patterns, and has not been equalled yet."

Page 44, Int. 8.

Upon the question of infringement, the testimony is as follows:—

Mr. Cook, of Tiffany & Co., says: "Q. 5. Will you look at Complainants' Exhibits C, D, E and F, and state whether or not their pattern is substantially like the pattern described in Complainants' Exhibit A? A. I should say it was. Q. 6. State whether an ordinary purchaser would be likely to take the pattern of these exhibits for the pattern described in Complainants' Exhibit A? A. I should think they would.

P. 12.

E. W. Sperry says: "Q. 4. Will you look at Complainants' Exhibits C, D, E and F, and compare them with Complainants' Exhibit A, and state whether or not in your opinion, the patterns of the exhibits is or is not substantially like the pattern described in Complainants' Exhibit A? A. I should say it was so certainly calculated to deceive any one but an expert, as the Complainants' Exhibit A, being with a double thread. Any person seeing one of these exhibits or articles like them, at one end of the table, and examining one like the design in Complainants' Exhibit A, at the other end of the table, could not tell the difference between them."

P. 14.

Martin S. Smith says: "In my judgment, if this pattern" (defendant's) "were made in silver, and placed in another store, that seven out of ten customers who buy silverware, would consider it the same pattern as the Cottage pattern, provided the patterns were in different stores."

P. 16.

Theodore B. Starr says: "The essential features I consider the same. Q. 9. State whether or not in your opinion, the resemblance is such as would mislead ordinary purchasers? A. I think it would."

P. 18.

E. V. Haughwout, in answer to the same question, says, "I think they are."

P. 21, Q 5.

H. H. Hayden says the two designs are substantially alike. Of their resemblance, he says: "In my opinion it would mislead and would be considered one and the same pattern by the trade; by the trade, I mean customers as well as manufacturers."

P. 23, Q. 4.

On his cross-examination, after pointing out slight differences, he says: "I consider myself an expert, and can detect very slight differences, which persons in the trade ordinarily would not, and I consider the whole Exhibits C, D, E and F, G, H, I, J and K, one and the same pattern, and I believe the trade generally would so consider them."

P. 24, Cross-Q. 15.

Alfred Brabrook says: "I should consider the specimens E and C, and also the specimens D and F, as evidently intended to imitate substantially H and K." And he says he has no doubt that "in many cases" the resemblance would mislead ordinary purchasers.

P. 27, Q. 6.

Jas. P. Church, of Hall, Elton & Co., says, of the patterns: "They are substantially alike, though Exhibit F varies more than the others."

J. T. Bailey, of Philadelphia, says: "I don't think that an ordinary observer would notice any difference on a casual observation. But, to a person skilled in this business, of course there are some small differences. I mean to say, that should an ordinary observer come into my store and take up these two spoons" (I and G), "he would not notice any difference in them, unless desired to examine them critically. And I further state that, in any pattern for spoons, individual spoons may present slight differences on a critical examination."

P. 35, Q. 4.

Henry D. Morse, of Crosby, Morse & Foss, comparing Exhibits C, D, E, F and G, with H, I, J, and K, says they are substantially the same thing so far as appearance goes. And comparing G and I, he says they are substantially alike "in regard to general effect and appearance, with a slight difference in outline. I should say they were the same in design, that is to say, an ordinary observer would see no difference between them." And he thinks the resemblance sufficient to deceive ordinary purchasers.

Mr. Bemis, of Bigelow & Kennard, is of the same opinion.

P. 40, Q. 3 and 4.

James A. Hayden, of Holmes, Booth & Haydens, says: "I should say they were substantially alike; so much so, that I myself, who pretend to know something about such things, do not think I could tell the difference between them if I looked at them apart, without making a critical examination." And he makes the same answer in regard to Exhibit G. On cross-examination he is asked, "Cross Q. 8. Do you consider the outline of Complainant's Exhibit G substantially the same as that of Complainant's Exhibit H, I, J and K? A. I think the similarity is so strong that it would not be detected without an examination more careful than is usually made by purchasers of such goods."

Pp. 42 and 43, Q. 3, and Cross 7.

Mr. Tiffany has no hesitation in saying they are substantially alike. He thinks the resemblance would mislead ordinary purchasers; and being asked if he himself might not be misled by it, answered, "I certainly might, if not beforehand told of the difference and my attention particularly called to it."

P. 44, Q. 4, 5 and 6.

Edward C. Moore, of Tiffany & Co., himself a designer, thinks there is a substantial difference between the patterns. But he says: "Q. 11. State whether or not the design of these exhibits is so nearly like that described in the patent that the ordinary purchasers would be led to mistake these exhibits for articles exactly like those described in the patent? A. I think he would. It seems to me that is what it is made for. Q. 12. Are the differences between the pattern described in the patent and the pattern of the exhibits such as would be apt to be detected by the ordinary purchasers? A. I should think not."

P. 11.

Newell Matson thinks the patterns substantially different, but thinks ordinary purchasers, seeing them apart, would mistake one for the other.

P. 18.

We have here then the testimony of gentlemen, representative men of the trade, as Mr. Tiffany calls them, who all swear that purchasers of silverware would mistake one of these patterns for the other. They are the largest men in the trade, their experience embraces the largest part of the business, and it is hardly possible that they should be mistaken.

In addition to these, we have the testimony of John

Gleave and James H. Whitehouse. Mr. Gleave is a die-sinker, and thinks that ordinary purchasers would be misled by the similarity, but not on a second comparison.

Mr. Whitehouse, who is a designer in the employ of Tiffany & Co., finds the designs to be substantially alike, although he is inclined to exclude Exhibit F from this statement. From his knowledge and experience in the business, he does not regard the designs of C, D, E and F as original, and thinks they were suggested by the design of H and I.

P. 31, Q. 4–7.

And Mr. Morse, another of Tiffany & Co.'s designers, testifies upon this point as follows :

"Q. 13. From your experience as a designer, what would you say as to whether two designs so nearly alike would be likely to be produced by different designers without the designer of the pattern made latest in time knowing the pattern earliest in time? A. I shouldn't think such a thing could happen. Q. 14. From your knowledge as a designer, what would you say as to whether the designer of the one pattern imitated the pattern of the other designer. A. I should think that the designer of C, D, E and F must have intended to imitate the effect in spirit, and yet make a difference. Q. If spoons and forks made after the pattern described in the patent had obtained a reputation and position in the trade, would spoons and forks of the pattern of these exhibits find sale by reason of the popularity of the forks and spoons just mentioned. I should think they would be sold for the same thing."

P. 11, Q. 14–16.

In addition to this testimony, we have the evidence of Geo. B. Tobey and Reuben R. Haskell, both salesmen of the Gorham Manufacturing Company.

Mr. Tobey, seeking to sell the Cottage pattern, was told by Mr. C. C. Shaver, of Utica, N. Y.: "It's no use for me to keep this pattern in silver when I can buy it so much cheaper in plate." Julius Walker, of Buffalo, made substantially the same remark. The trade generally said "That pattern (the Cottage) is copied in plate, and it's a shame your company cannot have the benefit of their brains." And the witness identified Exhibit G as being the pattern spoken of as this imitation.

Page 26.

Mr. Haskell had travelled through the West, and found D or G in all the principal cities of that region. At the shop of Mayo & Co., in Chicago, the witness himself mistook the infringing goods for the Cottage pattern.

Page 30, Q. 2–5.

The infringing goods are in plate, while the Cottage goods are in silver.

Mr. H. B. Renwick, a well-known expert, also testified in this cause. He says that had he been shown H, I, J and K, at one end of a table, and C, D, E, F and G at the other, he should have taken both sets of exhibits for the same design, and that, in fact, he did make this error until he had laid them side by side and carefully compared them. "I have even now, when picking them up, and after having the differences in my mind for several days, to be careful to direct my attention to the parts of the spoon where differences exist, in order to be sure that I am taking up the exhibit I wish to." He admits that there are minor differences in them, but deems them immaterial. "With regard to the ornamentation, the substantial characteristics of the design are that there shall be a threaded pattern around the edges of the handle, with a small knobbed ornamentation at the shoulders, and also at the head of the handle, where it is finished by a pointed projection." And these characteristics appear in the defendant's goods.

It also appears by the testimony of the defendant himself, that he considers his goods to be an infringement of the plaintiffs' patent. He is asked, "When did you begin to sell goods like Complainants' Exhibit F, and when did you cease to do so, if ever?" He answered, in an unguarded moment, "I do not recollect, sir; it is hard to answer, as it seems a variation from our old pattern; it looks as if it might have been altered from our old pattern—an infringement." "Q. An infringement of what? A. Of what is said to be the Gorham patent."

Page 6, Q. 17, 18.

The defendants, to prove non-infringement, have called a number of witnesses.

Henry J. Brown is a patent solicitor, and on behalf of defendants obtained the patent under which they claim the right to make their goods. He points out the same differences between the two designs which are pointed out by Henry B. Renwick and F. S. Renwick.

Dixon G. Hughes is a salesman of similar goods, and thinks the two patterns differ substantially; but it appears that the house for which he sells is itself an infringer.

Maclin is a die-sinker, and thinks the design substantially different; but when asked the question, "When you say Exhibit K and Exhibit G are substantially different, do you mean that it would require different dies to make them?" he answers, "Yes;" which is undoubtedly true.

Doane, a patent solicitor, points out the same differences which have been indicated by other witnesses.

Rogers, a die-sinker, thinks the design substantially different; but he is the die-sinker of the defendant's.

Coles agrees with these other witnesses. He does not know whether he has been an infringer or not, but thinks he may have been.

Charles Wood thinks the goods substantially different; and with him agrees his brother Abraham Wood.

John Cook testifies to the same effect, but on the cross-examination testifies that he is a broken-down silversmith, doing business under a false name.

Cooper, who swears to the same effect, admits that he has been an infringer.

Woodruff is of the same opinion, but has had no experience as a salesman, and is therefore unable to say how these goods would be regarded by purchasers in the market.

Johnson thinks the patterns are different; but he differs from Mr. Renwick in finding the difference to be in the outline; he also sees a difference in the tips, and points out that in the plaintiff's design there is an additional thread, and he also lays stress upon the difference of the swell of the handle.

Gilbert, of the Whiting Manufacturing Company, is called to testify to the same effect. He admits that there is a resemblance between the goods, but he thinks it is not a close resemblance.

Henry Ball, of the house of Ball, Black & Company, is the only witness called on behalf of the defendants, who belongs to a leading house in the silver trade. He testifies like the other witnesses for the defence, to the conceded difference between the designs; but he admits that there is a difficulty between Ball, Black & Company and the Gorham Manufacturing Company, of so serious a nature that all dealings between them have ceased. And finally Woodward agrees with all the witnesses in the case in pointing out the difference in detail, but he has had no experience as a salesman, and consequently can express no judgment in regard to the practical effect of the points of resemblance upon purchasers.

These are all the witnesses, except Mr. E. S. Renwick, who were called by the defendants to prove that the defendant's goods do not infringe the plaintiff's patent. Excepting Mr. Ball, they are none of them "representative men" of the trade. Many of them have been infringers; none of them differ substantially from Mr. H. B. Renwick's testimony in regard to the varying details of the two patterns. Their testimony amounts to simply this: that these differences which seem to the witnesses for the plaintiff to be immaterial, seem to them substantial. *But no one of them has been asked whether or not the resemblance would not be such as to lead purchasers, or even experts, into error.* Upon this point, the plaintiff's evidence stands entirely uncontradicted, and we must take this as an undisputed fact in this case, that whatever are the differences of detail between the two patterns, they are still so much alike, that in the market, with purchasers, they would pass for the same thing, and that even experts like Mr. Renwick, Mr. Hayden and Mr. Tiffany, would be liable to be misled by them.

Now, it is not pretended by the plaintiffs that the defendant's pattern is exactly like theirs; but it is claimed that the differences are immaterial, have no effect upon the artistic result of the designs, and that the patterns are so much alike that, in the language of the Court, in Cranshaw vs. Thompson (4 Manning and Granger, 363), the infringing goods are "calculated to deceive the unwary, or persons moderately skilled in the article, and to injure the sale of the plaintiff's goods."

The question then is, is the imitation close enough to amount to an infringement of the patent? It is agreed on all hands that so far as the outline of the handles go, the two classes of exhibits are substantially alike, and that the differences which have been pointed out relate only to the ornamentation.

We start, then, with the plain spoon of the plaintiffs' outline, without ornament, and proceed to compare with it the plaintiffs' and defendant's ornamentation. The first thing that strikes the eye is that each differs from the plain handle in this, that in each there is a shoulder, and at each shoulder a scroll. In the plaintiffs' design the scroll is on the outer thread; in the defendant's it is upon the inner thread, which proceeds downwards from the upper part of the handle; but both are scrolls, both break the monotony of the surface; one scroll turns in one direction, the other scroll turns in the opposite direction, but both make little bosses which are at first sight a striking feature of the plaintiffs' design. The top of both exhibits is crowned by the meeting of the lines of the threads. In the plaintiffs' design they turn outwards; in the defendant's they turn inwards. In the plaintiffs' design a boss of metal surmounts these two scrolls; in the defendant's a boss, a little larger, shaped like a shield, crowns the inturning bosses, but both break the outline of the top of the handle, and both have a broken surface, which is a relief to the eye of the observer.

In the plaintiffs' design there are two threads which surround the handle; in the defendant's there is but one. But the defendant's thread is nearly of equal width with the two threads of the plaintiffs', and produces substantially the same effect upon the eye, to wit, to relieve the bald surface of the shank, and to give it lightness and elegance. In defendant's the shank terminates at the bowl in a point; in the plaintiffs' the end of the shank is rounded, but the difference is very slight, and requires close examination to see it.

Now, it is nowhere pretended that a spoon or fork with the threaded handle, having bosses at the shoulder and crowned by the meeting of the threads, and with a boss surmounting this crown, was ever known before; and it is submitted that in this state of the art, to use one wider thread for two threads, and in-turning scrolls for out-turning scrolls, is a mere colorable evasion, and not a substantially different design. In other words, that the devices of the defendant's are simply the equivalents of the plaintiff's design, in an artistic point of view.

How is this to be decided? Is it by considering each line and scroll an independent device, and regarding the patent as being a patent for the combination of them as instrumentalities? or is it for the design as a whole, to produce a certain artistic effect upon the eye?

To answer this question, it is needful to consider the purpose of the Act of Congress under which this patent was granted. It was designed to foster and encourage the decorative arts. The decorative arts appeal solely to the eye. Threads, bosses, scrolls, tips, considered individually and apart, have no special artistic value, or effect upon the eye. It is their relation to that which they are employed to decorate, and to the parts with which they are united, to produce the general effect, which gives them their artistic signification. It is the eye of the observer which is to determine whether or not the design, as a whole, is or is not artistic, and whether or not it embodies the same artistic idea or thought. This fact, that it is the eye which determines the nature and quality of the design, is strikingly illustrated in the testimony of some of the plaintiff's witnessess. Mr. Sperry, for instance, on cross-examination, when asked how he should describe this design, said he should not describe it—he would take a pencil and make a drawing, and say: "There is the outline, and these are dots on the handle, which are raised metal; the lines represent threads of raised metal;" and he says he cannot give any better description than that.

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Mr. Smith, who has been 34 years in the business, being asked if he could describe it, said he could not. Mr. Cook, when asked to describe it, said he did not feel capable of making or giving a description: "There is very little more to describe except the threads on the front of the shank, or front side of the spoon, more properly. The threads lose themselves in the bowl; the threads on the back of the shank terminate at the heel, which, with the centre, form a piece of ornament." Mr. Haughwout, when asked to describe it, could only say that he calls it a neat, plain pattern, with a corded edge. Mr. Hayden says he can describe it more definitely by saying "From the bowl two-thirds up the handle, where it terminates with a dot, about two-thirds up the handle from the bowl; and that the spoon has two or more threads." Mr. Morse could only say that the elements of the design are a very simple thread, broken by a scroll. And all these experienced witnesses, eminent in their trade, agree that the design is something consisting in the general appearance, not to be adequately set forth by the recital of the instrumentalities which compose it. Now, what eye is to judge? Not the expert eye; for the expert, looking at each detail by itself, and pointing out the difference, wholly fails to appreciate or consider the general result, which is the aim and object of the artist. A careful observer of two roses, grown on the same tree, would find innumerable differences in their structure, organization and arrangement; and yet, to the common observer, they are alike the same.

The object of the statute under which this patent is granted is to encourage the decorative arts. The means proposed to encourage the decorative arts is, to secure to those who devote to them time, study and attention, the reward of a market for their productions. This market is made up, not of die-sinkers, infringers of patents, or of professional experts: it is made up of persons who purchase the articles either for sale or for use. Now, it is uncontradicted that this latter class would, going the market to purchase silver ware, purchase one of these patterns, supposing they were purchasing the other. It would be perfectly possible to set a table with the two patterns of forks and spoons, without the guests observing any difference between them, supposing they were both in silver. Now, if it be true that differences of detail which ordinary purchasers and users would not notice are sufficient to take the imitating article out of the infringement of the patent imitated, how is the purpose of the law to be carried out?

To use the illustration employed by Mr. Renwick, one of Rogers' statuettes of soldiers, would be substantially copied, although the copyist should substitute a rifle for a musket, or should take the bayonet off the musket (supposing one existed in the design), and should change boots for shoes, or *vice versa*, or in his statuettes of a soldier drinking, should substitute a round tub for a square trough, or a glass for a tin cup. He proceeds: "In a design for a carpet, I should think the design was substantially preserved, if the main features of the figures were unaltered, and the minor portions were changed by such changes as the substitution of a ring of flowers for a ring of stars, or a quatrefoil for a trefoil ornament, or other such changes." This was also the opinion of the Lord Chancellor in the case of McCrea vs. Holdsworth, which is reported in 6 Chancery Appeals, 418, which was a case in which a patent was granted for a combination of stars in a watch chain. In the infringing chain, the stars were turned the other way, producing, of course, substantially the same effect upon the eye of the observer; and it was held that this was clearly an infringement of the plaintiff's patent. This case meets very exactly the criticisms of the defendant's experts upon the differences between these two designs. They point out a difference in the scrolls at the shoulder, the defendant's scroll turning one way, and the plaintiffs' the other or both ways. They point out that in the plaintiffs' handle the ornamentation at its top turns outward, while in the defendant's it turns inward, and they point out that the bit of metal which crowns this ornamentation, in both, is adapted to the peculiar form of the scrolls on which it rests. But all that these criticisms amount to is, that these different scrolls turn different ways, and therefore are not to be deemed to be the same scrolls, and thus come precisely within the rule laid down by the Lord Chancellor in the case cited.

The learned Judge who tried this case below treated this patent as being for a combination of instrumentalities, precisely as he would treat a patent for a combined machine, as being for a combination of its operative parts. Now, looking at the matter technically, there can be no doubt that, even in this point of view, if the devices used by the defendant are the equivalents of those used by the plaintiff (that is to say, producing substantially the same effect in substantially the same manner), then they are within the patent. Now, take the threads of the plaintiff and the threads of the defendant—what is the function of each when it is placed upon the spoon or fork? Clearly, to break its blank surface, and to give it variety, lightness and elegance. Do not both operate upon the eye in the same manner, to wit, by narrowing the plain surface of the shank and the upper part of the handle? What is the office of the scrolls at the shoulder? To break the monotony of the thread and to give the eye something to rest upon; and the same office is performed in the same way by the ornamentation at the top of both. All these effects are produced upon the eye, and are the functions of the devices in both patents.

The Court below also erred in the construction of the statute.

Patents for designs are granted under the provisions of section 3, of the Patent Act of August 29th, 1842, as amended by section 11 of the Patent Act of March 2d, 1861. The last named act differs only from the former as to the duration of such grants, and the fees to be paid to the government therefor.

Section 3, of the Act of 1842, authorizes the grant of Letters Patent for any new and original "*design for a manufacture, whether of metal or other material or materials*," and after enumerating various other designs, "or any new and original shape or configuration of any article of manufacture."

The Court below says: "A design for a configuration of an article of manufacture is embraced within the statute, as a patentable design, as well as a design for an ornament to be placed on an article of manufacture. The object of the former may solely be increased utility, while the object of the latter may solely be increased gratification to a cultivated taste, addressed through the eye."

This, we submit, is an error.

The sole purpose of this provision of the statute is to encourage the development of beauty and taste in matters of art, whether as applied to the fine arts or to manufactures.

As applied to manufactures, it is to add to what is useful, beauty of configuration and ornamentation.

A change of form which produced a useful result is the subject matter of patent as an invention.

Davis *vs.* Palmer, 2 Brockenborough, 288, 310.

A configuration addressed to the eye may incidentally increase utility, and still be patentable as a design, but if the object be increased utility alone it is not patentable as a design.

By giving beauty of delineation and configuration

Courts have extended its protection to any part of the contents of a copyrighted book.

Campbell vs. Scott, 11 Sim, 31.
Cary vs. Long, 1 East, 357.

"In all these cases the question before the jury was whether the alteration be colorable or not."

Lord Mansfield in Sayre vs. Moore, 1 East, 361.
And see Bramwell vs. Holcombe, 3 Milne & Cr., p. 738.

c. The case of Daly *vs.* Palmer, 6 Blatchford, 256, furnishes a close analogy to the doctrine which we claim. The act of 1836 seeks to confer upon dramatic authors the exclusive right of representing upon the stage the play devised by them. In this case the defendant took the chief scene of the plaintiff's play and altering the detail of most of the incidents, the stage arrangement and direction required for its production, preserved intact the point of the scene, and appealed to precisely the same emotion in the minds of the spectators—and were held to infringe.

The construction of designs contended for by defendants' patents would make them of no practical use to designers. The law intends to reward him who has produced a new and beautiful ornament, with the pecuniary fruits which would result from the public desire to possess that ornament. The human eye is so constructed that it is not affected by a series of details as individual parts; but in looking at works of art, it grasps the whole as an entirety. To allow another to produce substantially the same artistic effect, to give substantially the same pleasure to the eye, by preserving the spirit and effect of the new design, while deviating from it in details which are not readily perceived, would render nugatory the whole purpose of the statute, and falsify the promise of reward which it holds out to artists.

It appears by the evidence that in the silver business the whole sale of forks and spoons depends upon the beauty and fitness of the design. Such is the testimony of Mr. Moore, of Mr. Cook (of the firm of Tiffany & Co.), of Mr. Starr, Mr. Haughwout, Mr. Hayden, Mr. Brabrook, Mr. Bailey and Mr. Morse. It further appears that of the new patterns introduced into the market a very small percentage succeed. Mr. Starr thinks about 1 in 40; Mr. Gleave, 1 in a dozen; Mr. Brabrook, 1 in from 6 to 12; Mr. Whitehouse, not 1 in 20; Mr. Church, about one-third; Mr. Bailey, 1 in 18 to 20; Mr. Morse, from 1 in 10 to 1 in 50; and Mr. Tiffany, only a small proportion.

Not only this; the introduction of a new design in silver is attended with very serious expenses. Mr. Sperry says that to one in the trade to introduce a new design would cost, for dies and other tools, from $3,000 to $4,000, and that to parties not in the business it would cost at least $6,000.

Page 14, Q. 5.

In view of this fact, and of the comparatively small number of patterns which are a success, no manufacturer would be justified, as a business man, in risking his money in bringing out new designs, if as soon as they were a success they could, under the law, be successfully imitated by making small variations in details, not noticeable to the general public, which would thus take away the market from his goods. Mr. Morse well illustrated the difficulty in his answer to the 11th question, page 37. When asked what he would say as to the value of a successful design for forks and spoons to its owner, he says, "I should not think of naming the value in dollars and cents; that would be very difficult to to articles of manufacture in the useful arts, they are rendered more saleable, and in the rivalship of industry among nations as well as individuals, those who produce the most beautiful articles of equal qualtity, will command the market.

As beauty of configuration and ornamentation in articles of manufacture is the inducement to the purchasers, the purchasing public are to be the judges.

From this it follows that if the defendant's spoons and forks are so close an imitation of plaintiffs' design, that purchasers will mistake the one for the other, it must be for the reason that the configuration and of ornamentation the two are substantially alike.

Reasoning inductively as the eye of the purchaser is the thing to be acted upon, if the configuration and ornamentation of the defendant's spoons and forks produce on that eye the same effect as the configuration and ornamentation of plaintiffs' design, the two must be substantially the same, for like causes produce like effects.

In the opinion of the Court below, it is admitted that in outline, that is configuration, one of the patterns of defendant is very much like plaintiffs' design, but that they differ in a marked manner in the ornamentation. Now, as they are alike in outline, and differ in ornamentation, and that difference is not sufficient to inform the eye of the purchaser that there is a difference, it must be obvious that for all the purposes of sale the defendant must have substituted an ornamentation which is the substantial equivalent of the ornamentation on plaintiffs design.

The rule adopted by the Court below for determining the question of infringement of a patent for a design, if confirmed by this Court, will be equivalent to denying protection to the patentees of designs.

If an article is held not to be an infringement of a patented design, because an expert can on close ex-

amination distinguish between the two, notwithstanding they are so much like that the purchasing public cannot distinguish between the two, then it follows logically that the patent will afford no protection, as the patentee cannot furnish all the purchasers with eyes expert in the detection of minor details of a design.

Designs have characteristic features which impress the eye as the characteristic features of a mechanical organization impress the reason. And in the one case as in the other, the minor details may be varied to any extent, so long as they do not vary the impression on the eye in the one case, and the impression on the reason in the other case, the design as the mechanical organization will remain in substance the same.

Each produces the same result in precisely the same way, and each as applied to a plain spoon of the outline of both, has substantially the same artistic result; and so within the strictest definition of the law of equivalents, the defendant's ornamentation as applied to the plain spoon of this outline, must be regarded as the equivalent of the plaintiff's ornamentation, when so applied.

The decided cases in England and in this country contain but little which is authority upon the question involved in this case. In addition to the Chancery suit above cited, there is only the case of Root vs. Ball (4 McLean, 177), which has a direct bearing upon it, and that decides that a design which produces substantially the same appearance as that described in the patent, is an infringement. There are, however, two classes of cases which furnish analogies to aid in discovering the rules which govern this question—cases relating to trade mark and those relating to copyright. The law of trade-mark is this: that no person shall use upon his goods a mark which has been adopted by another, and become known in the market as indicating that the goods so

marked are his. Now, these trade-marks, like designs, appeal to the eye, and are to be judged solely by the effect they produce upon the mind of the ordinary purchaser. Their purpose is to secure the person using the trade-mark, his market; and the purpose or design of the patent is to secure the inventor his market; but it has long been recognized that a trade-mark would be of no value if it was not infringed unless it was copied exactly and accurately. The courts have long held the rule which is laid down in the case of Seixo vs. Proverendo (1 Law R., Chan. 192): "What degree of resemblance is necessary from the nature of things, is a matter incapable of determination *a priori.* All that a court of justice can do is to see that no trader can adopt another trade-mark so resembling that of a rival that ordinary purchasers, purchasing with ordinary caution, would be likely to be misled. It would be a mistake to suppose that the resemblance must be such as to deceive persons who should see the two marks placed side by side. The rule so restricted would be of no practical use."

"A tradesman to bring his privilege of using a particular mark under the protection of equity is not bound to prove that it has been copied in every particular by another. It is enough for him to show that the representations employed bear such resemblance to his as to be calculated to mislead the public generally who are purchasers of the article, and to make it pass for the one sold by him."

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In Edelsten *vs*. Edelsten, 1 De. G., I. S., 185, the trademark of the plaintiff was an anchor; of the defendant, a crown and anchor. It was shown that a crown and anchor was frequently used on oth goods, but the Court held it to be an infringemen

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Each produces the same result in precisely the same way, and each as applied to a plain spoon of the outline of both, has substantially the same artistic result; and so within the strictest definition of the law of equivalents, the defendant's ornamentation as applied to the plain spoon of this outline, must be regarded as the equivalent of the plaintiff's ornamentation, when so applied.

The decided cases in England and in this country contain but little which is authority upon the question involved in this case. In addition to the Chancery suit above cited, there is only the case of Root vs. Ball (4 McLean, 177), which has a direct bearing upon it, and that decides that a design which produces substantially the same appearance as that described in the patent, is an infringement. There are, however, two classes of cases which furnish analogies to aid in discovering the rules which govern this question—cases relating to trade mark and those relating to copyright. The law of trade-mark is this: that no person shall use upon his goods a mark which has been adopted by another, and become known in the market as indicating that the goods so

marked are his. Now, these trade-marks, like designs, appeal to the eye, and are to be judged solely by the effect they produce upon the mind of the ordinary purchaser. Their purpose is to secure the person using the trade-mark, his market; and the purpose or design of the patent is to secure the inventor his market; but it has long been recognized that a trade-mark would be of no value if it was not infringed unless it was copied exactly and accurately. The courts have long held the rule which is laid down in the case of Seixo vs. Proverendo (1 Law R., Chan. 192): "What degree of resemblance is necessary from the nature of things, is a matter incapable of determination *a priori*. All that a court of justice can do is to see that no trader can adopt another trade-mark so resembling that of a rival that ordinary purchasers, purchasing with ordinary caution, would be likely to be misled. It would be a mistake to suppose that the resemblance must be such as to deceive persons who should see the two marks placed side by side. The rule so restricted would be of no practical use."

"A tradesman to bring his privilege of using a particular mark under the protection of equity is not bound to prove that it has been copied in every particular by another. It is enough for him to show that the representations employed bear such resemblance to his as to be calculated to mislead the public generally who are purchasers of the article, and to make it pass for the one sold by him."

Betts J., Walton vs. Crowley, 3 Bl., 440.

In Edelsten *vs.* Edelsten, 1 De. G., I. S., 185, the trademark of the plaintiff was an anchor; of the defendant, a crown and anchor. It was shown that a crown and anchor was frequently used on other goods, but the Court held it to be an infringement.

In Knott *vs.* Morgan, 2 Keen, 213, the Court enjoined the defendants from calling themselves the Conveyance Co., as infringing the trade name London Conveyance Co.

In Clement *vs.* Haddick, 22 Law Rep., 428, the plaintiff published a paper styled "Bell's Life in London," and the defendant published the "Penny Bell's Life and Sporting News," and were enjoined from using the words "Bell's Life."

So in Croft *vs.* Day, 7 Beav., 84, the defendants had copied only part of the plaintiff's label, and were enjoined.

In Clark *vs.* Clark, 25 Barb., 76, the plaintiffs label had the name "J. Clark, Jr., Mile End, Glasgow." On the outer circle were the words "Sole Agent, Wm. Wheelwright, New York." The defendants, whose names were J. & J. Clark & Co., had on their label "Clark & Co., End Hill, Paisley," and in the outer circle "Sole Agent, George Clark, New York." In all other respects the two labels were alike, and the Court held the latter to be an infringement of the former.

The latest case is that of Lee *vs.* Haley, in the March number (1870) of Law Rep., Chance Appeals, 161, where the Guinea Coal Co. obtained an injunction against the use by the defendant of the name "Pall Mall Guinea Coal Co."

b. A less complete analogy is furnished by the decisions of courts upon questions of copyright. In this country a book, or any part thereof, is covered by the statute; but in England the Statute of Ann, c. 8, applies only to books, and does not in terms include quotations or extracts. But the English

Courts have extended its protection to any part of the contents of a copyrighted book.

> **Campbell vs. Scott, 11 Sim, 31.**
> **Cary vs. Long, 1 East, 357.**

"In all these cases the question before the jury was whether the alteration be colorable or not."

> **Lord Mansfield in Sayre vs. Moore, 1 East, 361.**
> **And see Bramwell vs. Holcombe, 3 Milne & Cr., p. 738.**

c. The case of Daly *vs.* Palmer, 6 Blatchford, 256, furnishes a close analogy to the doctrine which we claim. The act of 1836 seeks to confer upon dramatic authors the exclusive right of representing upon the stage the play devised by them. In this case the defendant took the chief scene of the plaintiff's play and altering the detail of most of the incidents, the stage arrangement and direction required for its production, preserved intact the point of the scene, and appealed to precisely the same emotion in the minds of the spectators—and were held to infringe.

The construction of designs contended for by defendants' patents would make them of no practical use to designers. The law intends to reward him who has produced a new and beautiful ornament, with the pecuniary fruits which would result from the public desire to possess that ornament. The human eye is so constructed that it is not affected by a series of details as individual parts; but in looking at works of art, it grasps the whole as an entirety. To allow another to produce substantially the same artistic effect, to give substantially the same pleasure to the eye, by preserving the spirit and effect of the new design, while deviating from it in details which are not readily perceived, would render nugatory the whole purpose of the statute, and falsify the promise of reward which it holds out to artists.

It appears by the evidence that in the silver business the whole sale of forks and spoons depends upon the beauty and fitness of the design. Such is the testimony of Mr. Moore, of Mr. Cook (of the firm of Tiffany & Co.), of Mr. Starr, Mr. Haughwout, Mr. Hayden, Mr. Brabrook, Mr. Bailey and Mr. Morse. It further appears that of the new patterns introduced into the market a very small percentage succeed. Mr. Starr thinks about 1 in 40; Mr. Gleave, 1 in a dozen; Mr. Brabrook, 1 in from 6 to 12; Mr. Whitehouse, not 1 in 20; Mr. Church, about one-third; Mr. Bailey, 1 in 18 to 20; Mr. Morse, from 1 in 10 to 1 in 50; and Mr. Tiffany, only a small proportion.

Not only this; the introduction of a new design in silver is attended with very serious expenses. Mr. Sperry says that to one in the trade to introduce a new design would cost, for dies and other tools, from $3,000 to $4,000, and that to parties not in the business it would cost at least $6,000.

Page 14, Q. 5.

In view of this fact, and of the comparatively small number of patterns which are a success, no manufacturer would be justified, as a business man, in risking his money in bringing out new designs, if as soon as they were a success they could, under the law, be successfully imitated by making small variations in details, not noticeable to the general public, which would thus take away the market from his goods. Mr. Morse well illustrated the difficulty in his answer to the 11th question, page 37. When asked what he would say as to the value of a successful design for forks and spoons to its owner, he says, "I should not think of naming the value in dollars and cents; that would be very difficult to do; but I should say that, if protected in that design, it would be of immense value; and I should further say, as the artist rarely possesses business qualifications, after spending his time for weeks and months in originating a design, the moment it comes upon the market, capitalists take the pattern, flood the market and thereby prevent the originators from receiving any benefit."

If then the ruling of the Court below be sustained the purpose of the Legislature is clearly thwarted. The artist receives no protection from his patent, and can reap no reward from his labor, his study, and his genius. The case now before the Court is one of peculiar hardship. The plaintiffs are conceded to be distinguished for the beauty and artistic merit of the designs they produce. They introduced in the pattern in question an article which Mr. Tiffany, who may be fairly called the head of his trade in this country, pronounces to be unequalled for beauty and merit. The defendants have introduced an article, in plate, so closely resembling it, that it is agreed on all hands, and not sought to be denied by the defendants, that ordinary purchasers cannot distinguish the difference. It is in evidence (and it is obvious without it) that such an imitation in the production of plate is a great injury to the article in silver which it imitates. Mr. Moore, for eighteen years the designer of Tiffany & Co., testifies, from his experience as a designer, that the defendant's design could not, under the circumstances, have been produced without the knowledge of the plaintiffs'. It would be a discredit to our system of law, if for such a wrong there existed no remedy.

Keller & Blake
for Appellants

United States Circuit Court,

SOUTHERN DISTRICT OF NEW YORK.

IN EQUITY.

THE GORHAM MANUFACTURING COMPANY
vs.
GEORGE C. WHITE.

DECISION OF JUDGE BLATCHFORD,

ON FINAL HEARING.

KELLER & BLAKE, *for Complainants.*
GEORGE GIFFORD, *for Defendant.*

NEW YORK:
UNION PRINTING HOUSE,
No. 79 John Street.
1870.

U. S. Circuit Court,

SOUTHERN DISTRICT OF NEW YORK.

The Gorham Manufacturing Company *vs.* George C. White.	*In Equity.*

September 15*th*, 1870.

Blatchford, J.—This suit is founded on letters patent granted to John Gorham, Gorham Thurber, and Lewis Dexter, Jr., July 16th, 1861, for a design "for the handles of table spoons and forks." The completed spoon or fork consists of a bowl or fork, a stem, and an enlarged end, the stem being interposed between the enlarged end and the bowl or fork. The stem and the enlarged end constitute the handle. The stem is gradually but slightly increased in width from about the middle of its length towards each end, the swell being more sudden where it joins the bowl or fork. At the other extremity of the stem, where the enlarged end of the handle commences, a rounded shoulder spreads out on each side. The enlarged end then gradually spreads out on each side in concave lines. These lines afterwards gradually become convex to the widest part of the enlarged end. From this point they run back and inwards, and they finally unite to form a nearly semicircular end. Along each edge of the stem, and of the enlarged end of the handle, there is a small rounded moulding, and just within this a second moulding, and at the rounded shoulders these mouldings, which look like wires, are united by two rosettes, having somewhat the appearance produced by twisting together the ends of wires to unite them. At the end of the enlarged end of the handle the two sets of mouldings from each side are turned into a rosette, the two rosettes coming in contact in the middle of the width of the handle, and a small rounded tip making the central finish. Between the two inner mouldings the surface is swelled, such swell being gradually flattened from the stem towards the widest part of the enlarged end of the handle. The patent claims "the design herein specified for the handles of spoons and forks, as set forth and represented."

The bill alleges that the defendant has infringed the patent by selling spoons and other articles embodying the invention covered by the patent. The infringement is denied. Some of the articles sold by the defendant have been constructed, in design, in accordance with letters patent granted to Leroy S. White, January 15th, 1867, for a design for the handles of spoons and forks; and the rest of them have been constructed, in design, in accordance with letters patent granted to the said White, March 31st, 1868, for a design for the handles of spoons and forks.

In the patent of 1867 to White, the handle is made with a comparatively long and narrow stem or shank, and with low rounded shoulders upon its side edges, at the point where the handle begins to expand or broaden, and terminates with a small rounded projection at the extreme end. Along the edges of the front and rear side of the handle is formed a single line, following the contour of the handle, and extending down upon the head of the fork or spoon in the form of a rounded angle, such angle extending further down on the rear than on the front side of the head. Along the sides of the broader part of the handle is formed a second line, terminating at each end with an inward curve and a bead. In the space between the end curves of such second lines and the outer line, where the latter follows the outline of the rounded projection on the end of the handle, a shield is formed, having a central longitudinal rib or raised line. There is also on each side of the enlarged end of the handle a short curved line, starting from the end-curve of the before-mentioned second line, and uniting with such line at the broadest part of the handle.

In the patent of 1868 to White, the stem or shank portion of the handle is made with two rounded formations along its side edges, constituting a raised border, which follows the contour of the whole handle. The stem or shank portion forms its junction with the upper or expanded portion of the handle by a swell on either side, of convex shape. These swells gradually merge in concave lines, which give a narrowed configuration to the expanded portion of the handle above the swells. Farther up, the boundaries are continued by convex lines, which present a wider form, and the spread out portion finally terminates in a rounded or arched projection at the extreme end. Along either side of the broader portion of the handle, within the before-mentioned raised border, is a second line, following, for the most part, the contour of the border, but terminating at each end with an inward curve and a bead. In the space between the upper end curves of the before-mentioned second lines and the raised border, where it follows the outline of the projection on the end of the handle, a shield is formed, having a central longitudinal rib or raised line. There are also short curved lines, joining the end curves of the before-mentioned second lines with the broadest part of the handle.

The question to be determined is, whether the designs of the White patents are or are not substantially the same as the design of the plaintiffs' patent. Each design may properly be considered as composed of two elements, the outline which the handle presents to the eye when its broader face is looked at, and the ornamentation on such face. If the plaintiffs' design be compared with the White design of 1867, a general resemblance is found between such outlines in the two designs. In other words, if the ornamentation on the handle in the plaintiffs' design formed no part of such design, and such design were confined to the form of the outline before mentioned, it would be difficult to say that the plaintiffs' design and the White design of 1867 were not substantially identical. But the moment the ornamentations on the faces of the two handles come to be considered, striking differences appear between the plaintiffs' design and the White design. In the former, the outer thread is broken at the end of the handle, at the shoulders, and at the junction of the handle with the bowl; while, in the latter, such thread is continuous around the entire handle, from the junction of the stem with the bowl or fork back to the same point, it having there the form of a Gothic arch. In the former, the outer thread is, at the shoulders, turned inward to form rosettes, which present the appearance of two parts twisted together; while, in the latter, the outer thread is continuous. In the former, there is, on the stem of the handle, on each side, extending from the shoulders to the bowl or fork, an inner thread parallel with and inside of the outer thread; while, in the latter, there is no such inner thread. In the former, the inner threads on the enlarged end of the handle turn outward from each other towards the end of the handle, so as to form diverging scrolls; while, in the latter,

Supreme Court of the United States.

No. 168.

THE GORHAM MANUFACTURING CO.,

Appellants,

VS.

GEORGE C. WHITE,

Appellee.

BRIEF FOR APPELLEE.

BY

GEO. GIFFORD, Esq.

JERSEY CITY:
PANGBORN, DUNNING & DEAR, PRINTERS, 142 & 144 GREENE STREET.

1872.

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Supreme Court of the United States.

The Gorham Manufacturing Co.
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No. 168.

STATEMENT.

The Complainants in the Court below, claimed under letters patent granted to Gorham, Thurber & Dexter, on the 16th day of July, 1861.

The Defendant in the Court below was the selling agent in the City of New York, of goods manufactured by the firm of Rogers & Bro., in Waterbury, Conn., and among other things sold plated spoons and forks of their manufacture.

Leroy S. White, one of the employees of Rogers & Bro., made an invention of a design for the handles of spoons and forks, for which he obtained a patent dated the 15th day of January, 1867.

This design is represented by the drawing of the patent which is in evidence as "Defendant's Exhibit No. 6," and by an enlargement of the drawing which is in evidence as "Defendant's Exhibit No. 1."

Rogers & Bro., under license from White, commenced to make and sell spoons and forks under his patent, having handles made in accordance with the design for which that patent was issued. After continuing this for a short time, said White devised another design, and obtained a patent for it also, dated the 1st day of March, 1868, which is in evidence as "Defendant's Exhibit No. 7," and is represented by an enlargement of the drawing, which is in evidence as "Defendant's Exhibit No. 2." Rogers & Bro. then ceased using the design secured by White's first patent, and commenced using the design secured by his second patent, and have ever since continued such use. The Defendant sold such goods as Rogers & Bro., his principals, shipped to him, and consequently sold some containing the design covered by the first patent to White, but of these there was only a small quantity.

There are three specimens of handles put in evidence by the Complainants, all of which are alleged to be infringements on Complainants' patent. These are testified to by the Defendant, George C. White.

The first two of these specimens are substantially alike, and may be considered together as one and the same form; they are "Complainants' Exhibits C, D, E and F." The design of these is that which was patented to White by his first patent.

The other specimen of Defendant's handles is "Complainants' Exhibit G," and is the design patented to White by his second patent. This is substantially unlike either of the other two specimens. The defence is that—

NONE OF THE DESIGNS ON THESE SPECIMENS ARE SUBSTANTIALLY THE SAME AS THE DESIGN COVERED BY THE PATENT TO GORHAM, THURBER & DEXTER, ON WHICH THIS SUIT WAS BROUGHT, AND THAT THE DESIGNS USED ON THE ARTICLES SOLD BY THE DEFENDANT ARE INDEPENDENT OF ANYTHING SECURED TO SAID PATENTEES.

Attention will first be called to the law applicable to patents for designs.

FIRST.

The law applicable to inventions in machinery, and to the infringement of patents for inventions in machinery, is applicable also to inventions of designs and to the infringement of patents for designs.

An invention of a machine usually consists of parts, and the relation of parts, or the relation of parts only, resulting in a particular mode of operation which is the characterizing feature of the invention.

The invention of a process usually consists of successive steps in the mode of procedure, producing successive intermediate results which tend to and terminate in the final result. This final result may be a new product or substance, or it may be an old but improved product or substance, or it may be an old product produced in a more advantageous way.

The object to be attained by a design is not always limited to mere appearance; the end may be utility. Improvements, where mere changes of form are useful, may be patented as designs, and because useful, and not because of greater beauty or a more agreeable appearance.

The statute distinctly provides for such designs; the words of the statute are, "any new, useful and original shape or configuration of any article of manufacture."

A design is claimed as a unity, but it nevertheless, like inventions in machinery, is made up of parts, the whole of the parts in combination constituting the unity. The law, therefore, applicable to an invention in machinery is in like manner applicable to inventions of designs.

Booth *v.* Garelly, 1 Blatch., 247.
Root *v.* Ball *et al.*, 4 McLean, 177.
Wooster *v.* Crane, 2 Fisher, 583.

These cases are in conformity with the doctrine above stated, and they appear to be the only useful reported cases on designs. The first of these was for a design on a button, consisting of a combination of an ornament on the mould of the button with the mode of winding the silk covering. This combination was held by the Court to be "a new and original design for a manufacture." It had reference to the utility of the article.

This decision was rendered prior to the Act of 1861, under which the patent, on which this suit is brought, was issued. But the Act of 1861 did not alter the law from what it previously was, in any respect material to the subject-matter of the patent on which that decision was rendered.

The case of Wooster *v.* Crane was on a patent for a design for a reel, and appertained to the construction of the reel. It had reference more to the utility of the device than to its appearance. These cases maintain the doctrine that, like inventions in machinery, a patentable design may be composed of a combination of parts, all of which, separately, were old; or that it may be composed of a combination of parts, some of which, separately, were old, and some new;

or of parts all of which were new, and that when claimed together as one design there is but one thing patented, and that is a combination of all the parts.

In determining the question of infringement of a patent for a design, the same principles and rules must be applied as are applicable in determining the question of infringement of a patent for a combination in machinery.

If the patented design consists of a new addition to some old design, then any other person has a right to take the same old part and add thereto a part substantially different from that added by the patentee, and the use of the design so composed would not infringe the patent.

Where a design is patented as a *unity*, the patent is for a combination of all its parts, and any other person may use *any of its parts less than the whole with or without new additions, and not be an infringer.*

Judge McLean, in the case of Root vs. Ball, *et al.*, 4 McL., 177, which was a case on a patent for a design, says :

> "The principle of a machine is that combination of
> "mechanical powers which produce a certain result,
> "and in a case like the present, where ornaments are
> "used for a stove, it is an infringement to adopt the
> "design so as to produce substantially the same
> "appearance."

Here the Court makes a distinction between the *appearance* produced and the *means* of producing it, and illustrates it by reference to machinery. It follows, then, that inasmuch as the means, and not the result, is patentable in machinery, that it is the *means* and not the result which is patentable in a design. Now, inasmuch as appearance is the result in case of a design, it follows that appearance alone is not the controlling criterion in determining the question of infringement of a patent for a design; attention must be given to the *means* which produces the appearance; the *means* and not the *result* is the thing patentable.

The design covered by Complainants' patent *is* a *unity.* There is no claim for anything less than the *whole*, that is, a combination of all its parts; any person may take any of the parts less than all of the material parts and use them with or without additions, and not be an infringer.

SECOND.

The Court in determining the question of infringement of a patent for a design, should be governed by the same rules as to similarities and differences as the Commissioner of Patents is governed by in granting a patent.

The Court in comparing designs to determine the question of infringement, must be governed by some principle or rule. They cannot say that because two articles resemble each other in general appearance, and because one may be mistaken for the other by a cursory observer, that therefore one of them is an infringement of a patent for the other. Such resemblance may be due to something not invented by the patentee, and not patented. Two articles may resemble each other in general appearance when one of them in some part contains a patented design and the other has no such part, or anything corresponding therewith. Two spoons of corresponding size resemble each other, because they *are spoons*, and have the *form* of spoons; two forks resemble each other because they *are forks*, and have the *form* of forks. This might be true, notwithstanding one might contain an ornament of one design and the other an ornament of an entirely different design. Such resemblance would be no evidence that the design of one of the ornaments is an infringement on the patent for the design of the other. Such designs might be so slightly conspicuous as not to be noticed by a cursory observer. So a spoon or fork handle may be of an old form in reference to the outline or general shape, and yet contain a patented design of an ornament on some part of it which would not be noticed without having attention specially called to it. In such cases the old form, without having attention specially called to the new part, would control the appearance of the article. Because in such case the old form without the ornament would resemble in general appearance the old form with the ornament, and one might easily be taken for the other.

Take any article for illustration, say two white pitchers of the same size and shape; one has raised upon it an ornament of a given size and design, the other has raised upon it an ornament of the same size but of an entirely different design. These ornaments may be such as not to be noticeable by a cursory observer, so that to him the pitchers would resemble each other, and he would be likely to mistake one for the other, and particularly if one were in one room and the other in another room. A comparison of the pitchers with each other, as a means of determining a question of similarity or difference between the designs of the ornaments, would obviously be irrelevant and be likely to lead to a wrong conclusion. The question of similarity or difference between two designs of ornaments on an article cannot be safely determined by a comparison of the general appearance of the two articles containing the designs. The comparison should be between the ornaments themselves or between the articles, with sufficient attention to the ornaments to bring their peculiarities into the appearance of the article.

If a man look at a thing containing a new ornament, but not with sufficient attention to notice the peculiarities of that ornament, or to bring those peculiarities within the general appearance of the article, so that that general appearance to him is not affected by the peculiarities of the ornament, of course he is not thereby qualified to testify as to whether or not the design of the article with that ornament is or is not substantially different from, or substantially the same as the article with any other ornament; because to him the ornament does not participate in either making or changing the general appearance of the article. Similarity in the appearance of two articles taken in the aggregate is no proper test of a similarity or dissimilarity between the designs of the ornaments on them. The general appearance and resemblance of the two articles may be due to features other than the ornaments, and, therefore, have nothing to do with the relation of the ornaments to each other. There may be and often are patents for designs of ornaments on articles which do not materially affect the general appearance of the articles, and which require close inspection to see and distinguish the peculiarities of the designs, which peculiarities are the very things, and the only things which justified the grant of a patent, but which, to a cursory observer, would be nothing but a blank. To say, therefore, that a patent for a design may not be limited to something which does not materially affect the general appearance of the article, is a mistake.

There may be a patentable and patented design on an old article which so little changes the general appearance of the old article that without close inspection the article with the design on it would be mistaken for the old article without the design on it, but this obviously would be no reason why the old article without the design on it should be an infringement of a patent for the old article with the design on it, nor why the prior existence of the old article without the design should invalidate the patent for the design of the old article, inclusive of the ornament; in such a case evidence of a general resemblance of the two articles, and that one might be mistaken for the other, would not prove anything of use.

This is exactly the mistake made by the Complainants in the examination of their witnesses in this case. They have examined in respect to *general appearances*, which are not due to the additions made by the patentee to the old article. In such case the inquiry should have been directed to the additions which the patentee made to the old article, and which additions alone made his design patentable; or to the whole, with the additions performing a sufficiently conspicuous part to control the general appearance. It should have been as to whether or not the Defendant uses such additions.

The question then is, what is the proper test for the Court in determining similarities or differences in designs? The answer is, the test should be the same as the Patent Office applies in granting or refusing a patent for a design; that is, a comparison with special reference to the new parts; in other words, a comparison of the several parts which enter into the formation of the design.

There must be reference, not only to the general appearance of the article, but to the *means of causing* that general appearance.

When an application for a patent for a design is submitted to the Commissioner of Patents, if it be for an ornament on an article, say on a stove, his inquiry is not whether there is a resemblance between the article containing the ornament and one not containing it. The form of the stove may be such as to resemble another not having the ornament, and such that one might be mistaken for the other by any one whose attention should not be called to the peculiarity of the ornament. The inquiry of the Commissioner of Patents in such case would be, is the design of this ornament new on a stove; has there ever been substantially such an ornament so put upon a stove before? For the purpose of enabling the Commissioner to determine whether or not the design is new and patentable, and for the purpose of enabling others to distinguish it from all other designs, the applicant is required to describe it in his specification, and to point out in what the novelty consists, and of what parts the design is composed.

The Commissioner in determining in such case whether or not to allow a patent, passes from the general appearance of the article on which the ornament is placed to the ornament itself, to ascertain what the applicant has done, that is, to ascertain what forms, figures or parts he has added, and which enter into the construction of the ornament; because if all the applicant has done is to add a peculiar ornament to the old article, then any other person may add a substantially different ornament to the old article, and not infringe.

A design may consist of a new ornament on an old form of an article, or it may consist of a new form of the article; the latter is the most conspicuous, but the new form may be so small a deviation from the old one as to be mistaken for the old one, particularly when both are not present. Suppose A and B to severally make applications for a patent for a design of an ornament on a coffee cup—the cup in both instances being of the same old form—these ornaments may not change the general appearance of the cup, and they may be such that a cup having one of them on it might be mistaken for the cup with the other on it, and yet on a comparison of the ornaments, the Commissioner finding them substantially different from each other, would grant a patent for each of them. Now, in such case, the use of either of them would obviously not be an infringement of the patent for the other, and the general appearance of the two cups would not be the controlling test. The question with the Commissioner, in such case, is not whether these ornaments so change the appearance of the cups that they, the cups, do not resemble each other, or that one may not be taken for the other; but the question with him is, whether or not the ornaments themselves are substantially different from each other. If they are, he grants both patents; if they are not, then he grants the patent only to the one who is the first inventor. In case of a substantial difference, a patent would be granted for each design, although the differences between them might not be so conspicuous as to be noticed by a person having only one of the articles before him at a time. It is sufficient if the two ornaments be substantially different in *parts* and *relation* of parts, however much they may appear to be alike to a casual observer. The patent is granted for the novelty of the parts and the relation of the parts constituting the design, the same as for combinations of mechanism. In a machine, the parts and relation of parts are the *means* which produce the result, the *result* is the mode of operation or capacity of the machine. In like manner, in a design, the parts and relation of parts are the *means* which produce the result, but in a design, the usual *result* is appearance. The result in case of a machine is addressed to the judgment, while in case of a design the result is in most instances, but not always, addressed to the eye. In neither case is the *result* patented or patentable; it is the means only that is the subject of a patent.

O'Reilly *v.* Morse, 15 Howard, 62.

Reference to the Complainants' patent, and the two patents to White, in evidence in this case, will show that the requirements and practice in granting patents for designs are such as is above stated. From them it will be seen that the peculiarity of the design is required to be described or represented, and that the patent is granted or refused for designs, according to such peculiarities, and that the patent is not intended to cover, and does not cover, anything not having substantially these peculiarities.

In the Complainants' patent all the peculiarities which enter into the construction of the design, and which, collectively, constitute the design patented, were required to be stated, and are stated in the specification. By these peculiarities it was distinguished from all other designs, those previously known, as well as those thereafter to be invented. These peculiarities are not only represented in the drawing, and referred to by letters, but they are by appropriate words explained in the specification. These peculiarities cannot be ignored in determining what it is that was patented.

When White applied for his first patent, the Complainants' patent having then been issued, White was required to describe in his specification the several parts which entered into the construction of his design, and which would and did distinguish it from that of the Complainants, and from every thing else then known, and it was for a design so identified that he obtained his patent. His patent was issued for a new design, distinct from, and independent of, any other which like the Complainants was composed of a combination of an outline of the handle, of which he was not the author, and of side ornaments of which he was the author.

When White applied for his second patent he was required to describe, and did describe peculiarities which distinguished the design for which he asked a patent from the design which he had previously patented, and also from the Complainants' design, and from all others then known. This patent was issued to him for a distinct and independent design, composed of the side ornaments which were in his first design in combination with an outline of a handle not in his first patent, and not in the Complainants' patent, and which was an old and long known outline.

These three patents, that is, the two White patents and Complainants' patent were all distinct from, and independent of each other.

The design covered by Complainants' patent consists of the combination of two general divisions; one is the outline or the contour of the edge of the handle, and the other is the ornaments on the sides of the handle.

As nothing less than the whole is patented, there can be no infringement of the patent unless both of those divisions of forms be substantially employed. If the outline be used with substantially different side ornaments, or the side ornaments be used with a substantially different outline of the edge, then only *one* of the two elements constituting the patented combination would be used, and that, by well settled principles, would not be an infringement of the combination.

The Complainants' patent is expressly limited to peculiarities which the Defendant's handles do not contain.

Complainants' patent describes, as peculiarities of their design, at least twelve things, none of which are in any design used by the Defendant.

The drawings of patents are parts of the description, and in a patent for a design the drawing is the most important part of the description.

The following are described and represented as peculiarities of the design covered by Complainants' patent, and none of these features are in any of the designs used by the Defendant:

1st. Three protuberances united form the upper tip of the handle.

2d. A thread on the boundary of the handle, broken at the shoulders of the handle.

3d. The boundary thread is turned at the shoulders into the form of rosettes having the appearance of two parts twisted together.

4th. The stem of the handle, between the shoulders and the bowl, has two threads on each edge.

5th. On each edge of the leaf or palm of the handle is a thread inside of the boundary thread.

6th. These threads on the leaf or palm of the handle, and which are inside of the boundary thread towards the end of the handle, turn outward from each other, forming diverging scrolls.

7th. These scrolls of the inner threads form a part of the outline or boundary of the handle.

8th. The extreme upper end of the handle is formed by a tip inserted between these two scrolls.

9th. The inner threads of the leaf or palm of the handle abut against the rosettes formed by the outer threads at the shoulders of the handle.

10th. The surface of the handle, between the shoulders, swells, which swell gradually flattens towards the widest part of the leaf of the handle.

11th. The inner threads on the stem of the handle unite near the bowl in a swell or boss.

12th. On the under side of the handle a small raised leaf is inserted between the two threads on both sides.

These distinguishing peculiarities of Complainants' design are more fully stated by several of the witnesses, and among them by Mr. E. S. Renwick, as appears by the following extract from his deposition, in which Exhibit 8 is a specimen of Complainants' design, and Exhibit C is a specimen of the design first patented by White, and Exhibit G is a specimen of the design secondly patented by White. Mr. Renwick says:

> "In my opinion the design of the handle of Exhibit C is substantially different from the design described and represented in the copy of Complainants' Patent Exhibit 8. There is a general resemblance between the outline of Exhibit C and the outline of the design of handle described and represented in Exhibit 8, but the former Exhibit differs substantially in design from what is described and represented in Exhibit 8, in the following particulars:
>
> "In the design Exhibit 8 the outline at the palm or leaf of the spoon handle has the form of a portion of a trefoil, whereas in Exhibit C the outline of the

corresponding portion of the handle has the form of a Gothic arch.

"In the design Exhibit 8, the boundary of the ornamental part of the design is made up of a thread, which is broken at the shoulders, at the end of the handle, and at the junction of the handle with the bowl; in Exhibit C the boundary of the ornamental portion of the design is formed of a continuous thread, which is not broken at the shoulders, or at the end of the handle, or at the junction with the bowl, where the thread has the form of a Gothic arch, which is not found in the design represented and described as Exhibit 8.

"In the design represented in Exhibit 8, the bounding thread is turned at the shoulders to form rosettes, having the appearance as if formed of two parts twisted in together, while no such appearance is found in the boundary thread of Exhibit C at the shoulders.

"In the design represented in Exhibit 8, the stem of the handle between the shoulders and the bowl has a second thread upon it which is parallel with and inside of the boundary thread. No such second thread is found in Exhibit C.

"In the design represented in Exhibit 8, the leaf or palm of the handle has two second threads inside of the boundary threads, which inner threads towards the end of the handle are turned outwards from each other so as to form diverging scrolls. In Exhibit C there are two inner threads in the palm of the handle;

but these inner threads as they approach the end of the handle, instead of being turned outwards as in Exhibit 8, are turned inwards and form re-entering scrolls.

"In Exhibit 8 the scrolls of the inner threads at the end of the handle form a part of the outline of the handle. In Exhibit C the scrolls of the inner threads do not participate in any manner in forming the outline of the handle.

"In the design represented in Exhibit 8, the scrolls of the inner threads form a part of the boundary of the handle. In Exhibit C the scrolls being turned inwards form no part of that boundary, but are entirely inside of it. In the design represented in Exhibit 8 the extreme end of the handle is formed by a tip, which is inserted between the two scrolls. In Exhibit C, the extreme end is formed by the boundary thread which extends around the residue of the handle. In Exhibit C there is a shield-formed figure inserted between the scrolls and the boundary thread. In the design represented in Exhibit 8, no such figure is found, and no figure of similar configuration could be inserted, because of the difference in the configuration of the scrolls and boundary threads. In Exhibit C there is at each side of the scroll of the inner thread a short piece of a third thread, nothing of which kind is found in the design represented in Exhibit 8.

"In the design represented as Exhibit 8, the inner thread of the palm or leaf of the handle is of such configuration as to abut against the scroll or rosette of the outer or boundary thread, and to give it the appearance of a continuation of the boundary thread of the stem of the handle passed beneath the scroll which terminates the boundary thread of the leaf of the handle at the shoulder. No such configuration is found in Exhibit C, but the inner thread in that Exhibit is turned into a scroll and rosette, and has no appearance of being a continuation of the boundary thread of the stem of the handle.

"In the design represented in Exhibit 8, the surface of the portion between the threads is swelled between the shoulders, and this swell is gradually flattened towards the widest part of the handle, so that the swell at the broadest part of the handle is substantially different in appearance from the swell at the shoulders. In Exhibit C the portion between the threads is slightly swelled, but the swell is substantially the same throughout the leaf of the handle from its shoulders to its broadest part.

"In the design represented in Exhibit 8, the inner threads passing along the stem of the handle unite in a swell or boss in the vicinity of the bowl. No such swell or boss is found in Exhibit C.

"In the lower surface of the design represented in Exhibit 8, a small raised leaf is inserted between the boundary thread at each side and the inner thread at the junction of the stem with the bowl. No such leaves are found in Exhibit C.

"The same differences that I have stated as existing between the design of handle Exhibit C, and the design represented and described as Exhibit 8, exist

> also between the design of handle of Exhibit G and the design of handle represented and described in Exhibit 8. There is also an additional difference between the design of the handle Exhibit G, and the design of the handle represented and described in Exhibit 8. In Exhibit 8 the palm or enlarged part of the handle spreads out progressively from the shoulders until the widest portion of the handle is reached. In Exhibit G the corresponding part of the handle is narrowed for a certain distance, and is then spread outward so that the enlarged part of the handle of Exhibit G, considered by itself, has somewhat the outline of a figure 8 which has been squeezed sideways."

The claim of Complainants' patent is expressly limited to substantially those peculiarities. The patentees, in their claim, expressly say that what they claim as new, and desire a patent for, "is the design herein specified." It is an entirety. This is the exact thing for which the patent issued. It is the design specified.

Nothing is used by the Defendant which is patented by Complainants' patent. Nothing less than the whole of the parts in combination is patented, and that is not used by the Defendant.

It is proved and conceded that none of those peculiarities of Complainants' side ornaments are in the Defendant's design. A large number of witnesses on the part of the Defendant so swear, and give their reasons in detail; and there is not a single witness, on either side, who swears to the contrary, or who has pretended that the side ornaments in Defendant's design, in themselves considered, are the same, or substantially the same, as the side ornaments in the Complainants' design.

The design patented by White in his first patent, and which for a short time was used by the Defendant, did not contain, as appears by the patent itself, the Complainants' side ornaments; and it not only *had* side ornaments which were substantially different from those of the Complainants, but they were *patented* as being different.

The design patented by White in his second patent, and which is the one since used by the Defendant, has neither the Complainants' outline of the handle of the spoon nor the side ornaments; that is, it has neither of the two classes of elements which constitute the design of the Complainants.

The design patented to White by his first patent, which was dated the 15th day of January, 1867, not containing the Complainants' side ornaments, could not infringe Complainants' patent, even assuming that it had the outline or edge contour used by the Complainants, because in that case it would contain only one of the elements of the combination patented.

The testimony proving no infringement consists of the patents granted to White, and the depositions of witnesses.

The patent to White, dated the 15th day of January, 1867, is for the exact thing first used by the Defendant. This patent was for what was deemed by the Commissioner of Patents to be a new design, in contradistinction to the design previously patented by Complainants' patent. It was for a complete substitute for what was patented by that patent, and not for an addition thereto. The patent to Complainants was for a *unity*, and the patent to White was for a *unity;* they cannot, therefore, be for the same thing, unless the Commissioner of Patents has granted two patents for substantially the same thing. Each patent being for a *unity*, and each *unity* being composed of a corresponding *number* of parts, the one *unity* cannot contain the other. It is not a case where the unity in one patent is one of the parts of the combination in the other patent. There is not any part of a design used by the Defendant which was patented by Complainants.

The patent was granted to White for a new design; the Defendant used the design under this endorsement of the Government that it was new with White and different from Complainants'.

The same is true respecting the design patented by the second patent to White, and applies to that, if possible, with still more force, because in that design both ornaments and outline are entirely different from anything in Complainants' design. These patents or documentary pieces of testimony alone ought to be sufficient to exonerate the Defendant from the charge of infringement, but there is more.

The Defendant's witnesses all agree on the subject of these differences, and there is not a single witness on the part of the Complainants who has been able to maintain any statement to the contrary of what they say.

The Complainants' witnesses in speaking of similarities and dissimilarities, do not refer to similarities or dissimilarities between what is described and claimed as the Complainants' patented design and the designs described in the White patents and used by the Defendant, but they speak of the general appearance of the handle, which is controlled chiefly by its outline. Many of them admitted that they had not sufficiently examined to have learned what kind of ornaments were in Complainants' design; therefore their conclusions respecting similarity and dissimilarity could not have been drawn from a comparison between their ornaments and any others. These witnesses were controlled by the general appearance of the outline; but this outline was not in itself patented, and in the design patented by the second patent to White the outline was old and in common use long before the time of the alleged invention of the design of the patentees in Complainants' patent.

The weight of the testimony is all against the design of the Defendant being substantially the same as the design of the Complainants.

COMPLAINANTS' TESTIMONY.

Attention will first be called to the testimony on the part of the Complainants; it will be found that this testimony is exceedingly vague, and much of it entirely irrelevant. It was largely directed to subjects which are entirely immaterial. The principal subjects to which the examination on the part of the Complainants was directed are the following:

1st. As to whether or not an ordinary person seeing the two articles not together, but on different occasions, and in different places, might mistake the one for the other.

But this might obviously occur with articles having entirely different designs on them. Such evidence therefore is too vague.

2d. As to whether or not the articles resemble each other in *general* appearance.

They might have a general appearance without such appearance being at all due to anything added by the patentee to what was old. The question as to what causes the general appearance was studiously avoided in Complainants' examination.

3d. As to whether or not the witnesses believed that the object of the author of Defendant's design was to get something which would be mistaken for Complainants' design.

The Court is not trying the object or intention of the designer, but it is trying the question of substantial similarity or substantial difference in the designs as it finds them. A guess of a witness as to the object of the designer is certainly not evidence as long as there is no infringement, besides it is no matter what the *object* was. Object is not patentable.

4th. As to whether or not a popular design is a profitable thing.

This no one has denied or will dispute.

The Complainants examined twenty-two witnesses.

The first thing to be noticed respecting these witnesses is that thirteen of them were directly or indirectly interested in the success of the Complainants in this controversy, either as sellers of their goods or as employees of such sellers.

The only part of the testimony which is of any importance to this case is that which refers to the question, whether or not the designs are substantially the same, or substantially different. The testimony taken on this subject is pertinent to the issue.

In examining the testimony on the question whether the designs are substantially like or substantially unlike each other, attention must be given also to the fact of the difference between the two designs used by the Defendant, which were both patented. It must be borne in mind that a few of the spoons he sold contained the design for which the first patent was issued to Leroy S. White, dated January 15, 1867, and that the balance he sold contained the design for which the second patent was issued to said White. Nearly all were of the latter kind.

"Complainants' Exhibits C, D, E and F" (Ex. F differing only slightly from C, D and E) represent the design patented by the first patent to White, and which was used by the Defendant to only a limited extent.

"Complainants' Exhibit G" represents the design for which the second patent was issued to White, and which the Defendant has since continued to use.

"Complainants' Exhibits H, I, J and K" represent the design of "Complainants patent Exhibit A," being the patent sued on.

The Complainants' counsel in the examination of nearly all of his witnesses, limited his inquiries respecting similarities and differences to a comparison between the Complainants' design and Complainants' Exhibits C, D, E and F, which represent the design for which the first patent was issued to White. They have asked only a small number of their witnesses respecting a comparison of "Complainants' Exhibit G," (which represents the design of White's second patent) with the Complainants' design.

EDWARD C. MOORE.

(Page 10.)

This is one of the most competent witnesses called by the Complainants. His examination is limited to Exhibits C, D, E and F, and he is asked nothing respecting Exhibit G. He has been a designer for Tiffany & Co. for eighteen years. When called by the Complainants he testifies as follows:—

"Q. 9. Will you look at 'Complainants' Exhibits C, D, E and F,' and state whether or not, in your opinion, the designs which they exhibit are substantially the same as that described in 'Complainants' Exhibit A'?

"A. *Not substantially* the same, but evidently intended to appear the same.

"Q. 10. What do you mean by 'substantially the same'?

"A. The pattern or ornament is not the same substantially.

"Q. 16. Would the trade be led to buy them by reason of the close resemblance to the pattern described in the patent?

"A. I should think not."

The testimony of this witness, even with reference to the design first patented to White, is direct and positive that the designs are substantially different, and that the trade would not be led to buy one for the other. It is no matter what the design was *intended* for, so long as it, when done, is, as this witness testifies, substantially different from the one patented.

This witness' firm buys goods of the Complainants, and if biassed at all, it would be against the Defendant.

CHAS. T. COOK.

(Page 11.)

This witness was not a designer, and from his testimony it appears that he knew very little about designs. His examination-in-chief is limited to Exhibits C, D, E and F, and with respect to these he first swears that "he should say that the *pattern* of Defendant's spoons is substantially like the *pattern* of Complainants."

On being cross-examined as to what the design consisted of, he admits that he does not know, and says, "I do not feel capable of making or giving a description" of it. He was then further cross-examined as to the differences severally, and in this way was compelled to admit their existence, and on his cross examination he swears that Exhibit G is a different design from Complainants' The house of which this witness is a member purchases goods of the Complainants.

EGBERT W. SPERRY.

(Page 13.)

This witness is examined only with reference to Exhibits C, D, E and F, and with regard to them he first states that he considers the two *patterns* substantially the same, but on his cross-examination makes himself ridiculous by the following testimony:—

> "Cross-Q. 13. What do you consider the design described in said Letters Patent, 'Complainants' Exhibit A,' to consist of?
>
> "A. It consists of a design.
>
> "Cross-Q. 14. Question repeated.
>
> "A. It consists of a design; I don't see any other way of answering.
>
> "Cross-Q. 15. After thirty-seven years' experience in this business, can you not point out in what particulars this design, which has been brought to your

notice, and is described in 'Complainants' Exhibit A,' differs from any other design?

"A. Yes, sir, I can say about it this: I can see it differs just as much from any other design as a design that is a design differs from any other design in the designing.

"Cross-Q. 16. Has not every design peculiar elements, or characteristics, by which it is distinguished from all others?

"A. I should say it had.

"Cross-Q. 17. What are the peculiar elements or characteristics which distinguish this particular design, described in 'Complainants' Exhibit A,' from all others?

"A. The same as all other patented designs differ from other designs."

MARTIN S. SMITH.

(Page 16.)

The examination of this witness was limited to Exhibits C, D, E and F, and when asked with respect to these, if the patterns were substantially alike or substantially unlike he does not say that they are or are not, but evades that part of the question by saying that he thinks that if the patterns were in different stores one might be mistaken for the other. This witness purchases goods of the Complainants.

NEWELL MATSON.

(Page 17.)

This witness has carried on the jewelry business for at least twenty years, is well acquainted with the Complainants' pattern; it has been the principal one sold by him since it was made. His testimony on the question of substantial similarity or substantial difference is confined to Exhibits C, D, E and F, and is as follows:—

> "Q. 4. Will you look at 'Complainants' Exhibits C, D, E and F,' and compare them with 'Complainants' Exhibit H,' and state whether, in your opinion, they are substantially alike, or substantially different?
>
> "A. They are substantially different."

Here, again, is positive testimony from Complainants' witnesses that even the first design patented to L. S. White is substantially unlike that of Complainants.

THEODORE B. STARR.

(Page 18.)

The firm of this witness purchases goods of the Complainants. His examination is limited to Exhibits C, D, E and F. With respect to these he first says that he considers the essential features of the patterns the same, but on his cross-examination testifies thus:—

> "Cross-Q. 16. You say that the essential features of the design represented in 'Complainants' Exhibit K,' are the same, substantially, as those represented in 'Complainants' Exhibits C, D, E and F.' Please look at 'Complainants' Exhibit K,' and state what are the essential features of the design represented therein.
>
> "A. I don't know how I could describe it in words.

"Cross-Q. 17. How can you describe it?

"A. The only clear way to describe it is by a sketch.

"Cross-Q. 18. Will you please describe it by a sketch.

"A. I am unable to make a sketch."

E. V. HAUGHWOUT.

(Page 20.)

This witness purchases goods of the Complainants. When asked with respect to Exhibits C, D, E and F, whether the designs are substantially like or substantially unlike, he does not answer the question, but instead thereof says that he should call them very similar.

On his cross-examination, to the question "what are the principal features of the design represented in 'Complainants' Exhibit H,' being the Complainants' design," he answers: "It is what we call a neat and graceful pattern," and when asked "what, in your opinion, are the elements or features which make up the neatness and grace of this design; name any that you are able," he answers: "There is not much to say on this subject. It is easily kept clean —is perhaps one thing, being plain. I don't know that there is anything else necessary to say."

JOHN GLEAVE.

(Page 25.)

This witness is only examined with reference to Exhibits C, D, E and F, and with regard to these on his cross-examination says, that the patterns are not sufficiently alike to cause an ordinary purchaser on a second examination to mistake one for the other, but thinks a purchaser with only one kind present might mistake one for the other.

ALFRED BRABROOK.

(Page 27.)

The examination of this witness is confined to Exhibits C, D, E and F, and when interrogated respecting the patterns being substantially alike or substantially unlike, cannot, and does not, say that they are substantially alike, but can only say that he thinks that the Defendant's was intended to imitate the Complainants'. The question is not what was intended but what exists in the designs.

JAMES H. WHITEHOUSE.

(Page 31.)

This witness is an employee of Tiffany & Co., who sell Complainants' Goods. In his direct examination which was confined to Exhibits C, D, E and F, he testifies thus:—

> "Q. 4. Will you compare the patterns of Exhibits C, D, E and F, with the patterns of Exhibit H and I, and state whether or not they are substantially alike or substantially different?
>
> "A. They are substantially alike, though under my oath I shall feel inclined to exclude Exhibit F, as being exactly alike, although it was evidently suggested by the Cottage pattern."

At the end of his deposition he makes a correction by substituting Exhibit G instead of Exhibit F.

And on his cross-examination he swears that Exhibit G is not substantially the same design as the Complainants'.

JAMES P. CHURCH.

(Page 33.)

This witness has been a manufacturer of forks and spoons ever since 1837, and on his examination-in-chief, is limited to Exhibits C, D, E and F, and says in reference to these that he considers them substantially like Complainants' design. But on his cross-examination he admits that the resemblance is only in general appearance, and that the ornaments are all substantially different; and when questioned with reference to Exhibit G, on his cross-examination, with respect to that, he testifies thus:

> "Cross-Q. 9. Do you consider that the outline is one element of the pattern of these exhibits?
>
> "A. Certainly.
>
> "Cross-Q. 10. Look at 'Complainants' Exhibit G,' and say if you consider the outline of that spoon substantially like the outline of 'Complainants' Exhibits C, D and E'?
>
> "A. It is not.
>
> "Cross-Q. 11. Do you think a purchaser would be led, on seeing 'Complainants' Exhibit G,' to take it for the pattern of 'Complainants' Exhibits C, D and E, or not, considering outline and all?

"A. I do not think they would be likely to take one for the other."

Joseph T. Bailey.

(Page 35.)

This witness is questioned, in his examination-in-chief, respecting Exhibit G, as well as C, D, E and F, but, in answer to the question whether they were substantially like or substantially unlike Complainants,' he could not say that they were or were not, but says that he "don't think that an ordinary observer would notice any difference on a casual observation." This witness procures goods of the Complainants.

On his cross-examination, he says he thinks that the outline of Exhibit G was intended as a copy of the outline of Complainants'. If this be so, then both were intended to be a copy of the outline of the old Cable pattern, because the outline of Exhibit G is proved to be an exact copy of the outline of the old Cable pattern.

Henry D. Morse.

(Page 36.)

This witness, on his examination-in-chief, is questioned about Exhibit G as well as Exhibits C, D, E and F, and says that he considers them substantially the same in general appearance as Complainants' design. On his cross-examination, however, he shows that he comes to that conclusion by leaving out of view and entirely ignoring the outline as a part of the design.

Of course, the testimony of a witness speaking under such a misapprehension of the subject, is of no consequence.

He also admits, on his cross-examination, that the similarity which he refers to in the ornaments, means only what would appear to be such to a "casual observer." This witness sells Complainants' manufactures.

F. T. Bemis.

(Page 39.)

This witness is questioned on his direct examination about Exhibit G, as well as Exhibits C, D, E and F, and says he should think their pattern was substantially like Complainants' pattern; but on the cross-examination he says he does not think that either the outline or the raised surface forms an element of Complainants' design, thus showing that he, as well as the last witness, entirely misapprehended the nature of the subject. He also, on his cross-examination, explains what he means by similarity in the designs, which is similarity in "the general appearance of the design to a casual observer;" and he then defines what he considers a casual observer thus—"casual observers do not generally pay any attention to such things."

If this be true, it is no wonder that such observers would see no difference in such things. If the relation of designs is to be tested by their appearance to persons who don't give them *any* attention, then, of course, all designs might appear to be the same. It is by such vague and indefinable notions of some of the Complainants' witnesses, feeling an interest in the success of the Complainants, that they are enabled to say that they think the Defendant's and the Complainants' designs are substantially the same in appearance.

The firm of this witness procure goods of the Complainants.

GEORGE C. WHITE, JR.

(Page 7.)

This witness in answer to a question put by Complainants' counsel, swears, page 7, Q. 18, that he considers there is a substantial difference even between "Complainants' Exhibits 'F' and 'G.'"

HENRY B. RENWICK.

(Page 45.)

The testimony of this witness requires close examination, otherwise from being misunderstood it may mislead. He says he has no doubt but that Exhibits C, D, E and F are substantially identical with Complainants' design. He does not say, nor does he mean, that the materials or means of producing the general appearance are substantially alike. He explains that all he means by identity is such a resemblance as would cause a person to mistake one for the other if both were not present at the same time. He then gives as a reason for his conclusion, that he does not think that every change in either contour or ornament would make a substantial difference in the design. This no one has ever doubted; but this has no meaning whatever in its application to the designs in question. It is not contended that the designs C, D, E and F are different from Complainants' design, only because of a change in one or a few of its parts, but because it is different in every part, except, perhaps, the outline; and as to the design Exhibit G, it is different from Complainants' in every part inclusive of the outline. Mr. Renwick could not swear that in his judgment Exhibit G is substantially such a design as the Complainants', but referred it to what he calls "the better opinion." Whose opinion he meant he does not say. It is very clear to any one acquainted with professional experts, that if it had been *his* opinion he would have stated it, and without reservation. In order to make similarities, this witness swears in direct contradiction to the Complainants' other witnesses, C. L. Tiffany, J. P. Church, R. R. Haskell, A. Brabrook, E. V. Haughwout, and in direct contradiction to what, on an application of a suitable test, is found to be the fact. C. L. Tiffany, p. 45, Cross-Q. 17; James P. Church, another of Complainants' witnesses, at page 34, Questions 15, 16, 17 and 18; R. R. Haskell, another of Complainants' witnesses, at page 31, Cross-Q. 16, and E. V. Haughwout, still another, at page 22, Cross-Q. 23, all swear that the handle is not convex between the shoulders, while Mr. H. B. Renwick, at page 47, Q. 7, swears to exactly the contrary. He says that the shank of G is convex, and that that convexity extends into the head of the spoon, meaning that it extends between and beyond the shoulders. When such an effort is made by an expert to produce similarities, and when it is found that he dare not say that Exhibit G is substantially such a design as Complainants', it is strong evidence to show that, in his estimation, the designs are substantially different and independent of each other.

The expert of the Complainants, in reference to the second design, patented by White, and which is represented by Exhibit G, says: "I think the better opinion is, that it is within the line of substantial identity. It might deceive me in going from one store to another, *but not if shown me in the same shop where I had just examined one of Plaintiff's spoons.*"

This is as good testimony for the Defendant as can be desired. It distinctly admits that the one design would not be taken for the other when both were present, and this obviously is the only way a proper comparison could be made.

Such is the testimony on the part of the Complainants, produced to prove an infringement, and before referring to the testimony taken on the part of the Defendant, it is respectfully submitted that the Complainants' testimony proves exactly the opposite of what was intended by it. The Complainants' have called twenty-two witnesses, and so far as Complainants' design and Exhibit G are concerned, the one which Defendant has chiefly used, only seven of them pretend to say that they find any substantial similarity between them, and most of these when put upon details on cross-examination, as has been shown, testify that they are dissimilar. All the others are either silent on that subject or on their cross-examination say in substance that they are not substantially alike. Their silence is a sure indication that they could not and would not swear that the design of G is substantially like the design of the Complainants. It therefore follows that out of twenty-two witnesses, the best for the Complainants' purpose, they could find only seven of them who could swear to anything respecting similarity between design G and Complainants' design which would be of advantage to Complainants' case. This leaves the remaining fifteen of the twenty-two witnesses in effect witnesses for the Defendant.

The testimony of the Complainants, given by their traveling agent, proves that the only articles which they found in the market in competition with them were those like Exhibit G, except a few like D.

DEFENDANT'S TESTIMONY.

Attention will now be called to the testimony on the part of the Defendant, the first piece of which is the endorsement of the Patent Office of the United States that all three of the designs—the Complainants', the one first patented by White, and the one secondly patented by White, are substantially different from each other, and that each is independent of either of the others. Each one of these patents is for a unity, and for nothing less or other than a unity. All of them include an outline and side ornaments, and not one of them includes anything more, not one of them is for any one or more of the elements less than the whole; neither patent can therefore comprehend the contents of the other unless its contents in the aggregate, as a whole, is like the contents of the other. The Commissioner of Patents decided their contents to be substantially different from each other. This he must have done, else, in violation of his duty, he granted a plurality of patents for the same thing.

Let this be illustrated by reference to patents for machinery. A patent is granted to A for a combination of three parts of a machine, and nothing else. Such a patent is for a *unity*. If it be found that B has a patent for the same combination, his is also a patent for a unity, and the two patents would be for identically the same thing. Now the same is true with reference to designs; they, like machinery, are composed of parts, and a patent for the design as a whole is a patent for a unity, and if another patent be granted for a design as a whole which is substantially the same, the two patents are for substantially the same thing.

In addition to the grant and existence of these patents, showing the designs to be different, is the testimony of seventeen witnesses on the part of the Defendant. The first thing to be noticed respecting these witnesses is, that with the exception of Hughes and Cooper, not one of them has any interest, directly or indirectly, in the matters in controversy, or any interest in the success of the Defendant, and that the only connection of Hughes and Cooper with the subject-matter is that they have procured some of Defendant's goods to fill orders of their customers. These seventeen witnesses testify absolutely and unequivocally that the designs of all of the Exhibits C, D, E and F are substantially different from Complainants' design, and many of them give their reasons at length.

HENRY T. BROWN.

(Page 49.)

This witness is one of the editors and proprietors of the scientific publication entitled the *American Artisan*. He is also a solicitor of patents, and has had many years experience in the inspection and description of designs.

DIXON G. HUGHES.

(Page 52.)

This witness is a clerk in a silver-ware manufacturing establishment, and, consequently, is familiar with designs.

BENMORE MACLIN.

(Page 53.)

This witness is a die-sinker, in Williamsburgh. This witness, besides testifying that the Defendant's and Complainants' designs are substantially unlike each other, also testifies that he has known spoons with handles of designs like Exhibits No. 9 and No. 10 as articles of merchandise ever since 1846 and 1847. These are handles having an outline or contour exactly the same as that in the second patent to White, and which is represented by Complainants' Exhibit G. This testimony, therefore, proves that outline to have been well-known prior to the time of the alleged invention of Complainants' design.

A. SIDNEY DOANE.

(Page 54.)

This witness is a solicitor of patents, and is a graduate of the New York University.

RICHARD H. ROGERS.

(Page 55.)

This witness is an engraver and die-sinker, carrying on business for himself, and in his testimony gives a detailed statement of his reasons for the conclusions which he expresses.

ALBERT COLE.

(Page 57.)

This witness is a silversmith, in the city of New York, has been such for 30 years, and carries on the business of manufacturing on his own account. His business is to manufacture and sell silver-ware, and not plated-ware.

ANTHONY SCHAEFER.

(Page 58.)

This witness is a die-sinker and designer, and has been in that business for about 14 years, carrying on the business on his own account.

FRANCIS W. COOPER.

(Page 58.)

This witness is a manufacturer of silver-ware, not plated-ware. He is also a designer. He has been engaged in that business for 25 years, and carries it on on his own account.

CHARLES WOOD.

(Page 61.)

This witness is a manufacturer of silver-ware—not plated-ware—in the city of New York, as one of the firm of Wood & Hughes. He has been engaged in such manufacture for 20 years.

ABRAHAM WOOD.

(Page 62.)

This witness is a manufacturer of silver-ware, including spoons and forks. He has been silversmith and manufacturer of silver-ware since 1832, and is a member of the firm of A. & W. Wood, N. Y. City.

JOHN COOK.

(Page 63.)

This witness is a manufacturer of silver-ware. He has been engaged in this business for thirty-five years, and his attention, during this time has been attracted to the different designs of forks and spoons.

ALEXANDER WOODRUFF.

(Page 64.)

This witness is foreman for the house of Lewis, Kimball & Co., New York, of the department of their business consisting in the manufacture of spoons and forks. He has been engaged in the business of silver-ware manufacture for twenty-six years.

JOHN W. JOHNSON.

(Page 65.)

This witness is a dealer in silver-plated ware in New York City. He has been in this business for seven years, and has been especially engaged in the branch of spoons, forks and hollow-ware.

PHILO B. GILBERT.

(Page 66.)

This witness learned the trade of silversmith when he was fourteen years old. He has been in that business continuously for thirty-eight years. Until within the last year and a quarter he has been a manufacturer on his own account. He is now in the employ of the Whiting Manufacturing Company, whose factory is in North Attleboro', Massachusetts, and salesrooms in New York City, and has generally had charge of the fork and spoon department.

HENRY BALL.

(Page 69.)

This witness is the senior member of the well-known firm of Ball, Black & Co., New York City. He is a silversmith and jeweler, and has been in this business since 1832, and has dealt with the Complainants.

JOHN H. WOODWARD.

(Page 72.)

This witness learned the business of a silversmith practically thirty-five years ago, and has been engaged in it ever since. His business is a wholesale one in the City of New York, and has been of such a character as to cause him to come in contact with and to notice different designs for spoons and forks.

EDWARD S. RENWICK.

(Page 73.)

Mr. Renwick is an expert whose reputation for competency is well known. He swears positively and unequivocally that the designs represented by all of the Exhibits C, D, E, F and G, are substantially different from Complainants' design, and he states in detail the items of difference. Between the design of Exhibits C, D, E and F, and Complainants' design, he points out fifteen differences, and between the design of Exhibit G and Complainants' design he points out sixteen differences. In short, he shows that there is not a single feature which is common to Exhibit G and Complainants' design, and none which is common to

Exhibits C, D, E and F, and Complainants' design, except a general similarity in the contour or outline of the handles.

It is respectfully submitted that more direct and positive testimony than that given by the Defendant's witnesses, or from more reliable sources, could not be produced.

COMPLAINANTS' THEORY

The Complainants in the Court below relied chiefly on decisions in cases of trade-marks. They assumed that a trade-mark was so nearly the same as the subject-matter of a patent for a design as to make an adjudicated case in one, an authority for the other.

This is a mistake.

The law applicable to trade-marks is not the law which is applicable to letters patent.

A *patent* for a design, like a patent for anything else, must be governed by the *law of patents*. When a patent is taken, the patentee *voluntarily* commits the subject-matter of his patent to the province of the patent law. He voluntarily puts it in that class of property. He invokes the aid of the patent law for its protection, and he therefore voluntarily submits to and must abide by that law. He makes an investment in a kind of property which comes under a particular code or branch of law for its protection and government; he therefore must abide by the settled rules and principles of that branch of law; he cannot ignore decisions and time-honored authorities in that branch, and invoke to his aid decisions and authorities from some other branch.

His condition in that respect is nothing unusual. If one procure a vessel and send her to sea, he commits his property therein to the government of the maritime law, and he cannot, thereafter, in settling a collision controversy, ignore the rules and principles of the law of admiralty and invoke the aid of decisions in criminal cases.

If one enlist in the army or navy and a controversy arises respecting his rights or duty, he must abide by the code under which he has placed himself, and cannot cite cases from the civil law to control the action of a court-martial.

If one has made an investment in real estate, and a question of title arises, he must be governed therein by principles of law applicable to titles of real estate, and not by those applicable to patents for inventions.

In like manner, if one has decided to take, and has taken a *patent* for a design, and a controversy arises respecting his rights under the patent, he must be governed by the established principles of the patent law, and not by decisions in trade-mark cases.

Again, the subject-matter of a patent and that of trademarks are not only governed by different law, but they are entirely different things. A design does not perform the office of a trade-mark, a trade-mark does not perform the office of a design. A trade-mark forms no part of the article on which it is placed; it is a mere *sign*, and has no reference to any change in the article on which it is used. A trade-mark is placed upon the article, not to change or affect the article, but to indicate the "origin or ownership" of the article. Such is not the function or office of a design. A design becomes, and is, a part of the article itself, it is incorporated with the article, and is bought and sold and used as a part of the article just as much as if it were a new mechanical combination. A design has reference to some alteration in the character of the article, a trade-mark has no such property.

A trade-mark is a sign usually employed to indicate by whom the article on which it was placed was manufactured; an imitation of the trade-mark is an attempt to cause the public to believe that the article on which the imitation is placed is made by a party who in fact did not make it. Such use of an imitation, therefore, is an attempt to enact a falsehood to the injury of another; it is therefore a fraud.

A design has no such function, and does not produce any such result.

It is not used as a sign to represent *another* fact, and therefore it is not used and cannot be used to represent a falsehood in reference to such other fact. A design is not used as a sign to represent the *origin* of the article, and therefore is not and cannot be used to represent a falsehood in reference to such origin. It can no more represent the "origin or ownership" of an article of which it constitutes a part, than a patented mechanical combination represents the "origin or ownership" of the article of which the combination constitutes a part.

The design in question has no such function, and is not used, and has not been used for any such purpose. The spoons and forks containing the White design, and sold by the Defendant, are stamped with the manufacturers' own name, "Rogers & Brother," and they are sold as their manufacture and not as the manufacture of any other party. There is, therefore, no deception, and no attempt at deception.

The use of an infringing trade-mark is to fraudulently deceive a purchaser, causing him to believe that he is purchasing goods of one manufacturer, when in fact they were made by another. It is therefore a fraud, and intended to deceive and cheat the purchaser. The use of the White design by the Defendant does not and cannot have any such effect. It has no result of such a kind. It is not used to deceive, and cannot be. No such result is claimed by the Complainants. All they claim or pretend to claim is that the design used by the Defendant is upon plated articles, and that theirs is upon silver articles, and that because of some resemblance in general appearance to a cursory observer, parties will not so readily purchase their silver articles for fear somebody will suppose that they have plated articles, that is, their claim is that the Defendant's design must be suppressed because it is on plated articles, and theirs is on silver articles. All they complain of is that the design of the Defendant's being used upon plated articles will render it so common in the estimation of some that they would not like to purchase a silver article, having on it a design which, from general appearance, might seem to a cursory observer to be a similar thing. They do not claim that any one is deceived by the use of Defendant's design, or that there is any attempt by such use to deceive any one. They simply say that the Defendant must not cause his plated articles to have a general appearance like their silver articles, because if he does, persons who are vain enough to desire to have it understood that they are using silver and not plated articles, would not buy their silver articles. Their position is that the purchaser will say, "I will not buy your silver spoons, because my neighbor has plated silver spoons which resemble them in external appearance, and therefore others will suppose that my neighbor can have as good spoons as I can."

The Complainants' counsel in their effort to assimilate the function of a design to that of a trade-mark, made this statement in their brief in the Court below, to wit:

> "The advantage of both to the owner is that the mark or design is seen and recognized by the buyer, who is attracted by them. The injury to the owners of both is effected in the same way by deceiving the eye of the purchaser, and thus alluring to buy the wares of others."

This statement being the best that counsel could frame in their attempt to assimilate the office of a design to that of a trade-mark, is so palpably incorrect as to aid in showing the contrary of what was intended by it. They say that the injury to the owners of both is "by deceiving the eye of the purchaser and alluring him to buy the wares of others." Now what purchaser's eye is deceived by the Defendant's use of his designs? Does any purchaser of the plated goods having on them the Defendant's design, suppose he is buying silver goods? Does any purchaser of a spoon sold as a plated article for fifty cents, suppose that he is buying a silver spoon worth four dollars? Does a purchaser when buying a plated spoon which is marked and sold as the manufacture of Rogers & Brother suppose that he is purchasing a silver spoon manufactured by the Gorham Manufacturing Company?

This effort of the counsel to assimilate the office or the effect of the use of a design to that of a trade-mark, is so entirely unsuccessful as to, in fact, illustrate their dissimilarity. The Defendant's counsel agrees with the Complainants' counsel that an imitation trade-mark is to deceive the eye of a purchaser, causing him to believe that he is purchasing an article of one manufacturer, when, in fact, it was the manufacture of another. But nothing of this kind is done by the Defendant's use of his design. No purchaser's eye is deceived by the use of his design, and no purchaser is caused thereby to believe that he is purchasing an article made by one manufacturer, when, in fact, it is made by another.

But even if the design patented by Complainants' patent were a trade-mark, and the design used by the Defendant were a trade-mark, so as to make it a question between two trade-marks, the latter would not be an infringement on the former. It is true, that as between a trade-mark and an imitation of it, such general resemblance as would mislead buyers ~~to~~ who exercise the usual amount of prudence and caution, may constitute an infringement, but in such case, the resemblance must be between the two trade-marks which are placed on the article, that is, the imitation trade-mark must, in itself, have a resemblance to the genuine trade-mark. The two things in such case to be compared, is the individual imitation with the individual genuine. In making the comparison, neither the imitation nor genuine can include in its appearance the form, or any other characteristic, of the article on which the mark is placed. The general appearance referred to in such case must be limited to the general appearance of the trade-mark and cannot comprehend therein the appearance of the article on which the trade-mark is placed, that is, one man cannot properly say to another "Your trade-mark which you place on your ploughs resembles my trade-mark which I place on my ploughs, because your plough is very nearly the form and the color of my plough." Any resemblance due to the shape or size of the article on which the trade-mark is placed, must not enter into or affect the comparison. If the two trade-marks would not resemble each other when placed upon ploughs of substantially different forms and colors, then they have no such resemblance as brings them within the law applicable to trade-marks, or as would render the one an infringement on the other.

If A and B are severally engaged in the manufacture of an article, say spoons, and A uses on his spoons a trade-mark to which, from usage, he has acquired an exclusive right, and B places on his spoons a stamp or mark which in itself has no such general resemblance to the trade-mark of A as would tend to mislead a purchaser; but nevertheless, the spoons sold by B, inclusive of the trade-mark, have a general resemblance to the spoons sold by A, inclusive of his trade-mark, which general resemblance is chiefly or entirely due to the form and size of the spoon itself, such a resemblance would not cause B's stamp to be an infringement upon A's trade-mark. It follows, therefore, that even if the ornaments placed upon the spoon handles by the Complainants were a trade-mark instead of being a patented design, and the ornaments used on the spoon handles by the Defendant were a trade-mark instead of also being a patented design, the proof in this case would clearly exonerate the Defendant from the charge of infringing the Complainants' trade-mark, because all the resemblance in general appearance between the Complainants' and the Defendant's spoons is either implied or stated by the witnesses to be chiefly due to the forms of the spoons.

GEO. GIFFORD,
Counsel for Appellee.

such inner threads, as they approach the end of the handle, turn inwards and form re-entering scrolls. In the former, the scrolls of the inner threads form, at the end of the handle, a part of the outline boundary of the handle; while, in the latter, such scrolls are entirely inside of such outline boundary. In the former, the end of the handle is formed by a tip inserted between the two diverging scrolls into which the inner threads are formed; while, in the latter, the continuous outer thread forms such extreme end. In the latter, a figure in the form of a shield is inserted between the scrolls into which the inner threads are formed and the outer thread; while, in the former, no such figure is found, and no place exists where it could be inserted. In the latter, there is, on each side, a third and short thread, extending from the said scroll to the widest part of the handle; while no such thread is found in the former. In the former, the inner thread on the enlarged end of the handle abuts, at the shoulder next the stem, against the scroll or rosette into which the outer thread is there formed, and looks as if it were a continuation of the outer thread on the stem passed under the said scroll; while, in the latter, the inner thread on the enlarged end of the handle is, at the shoulders, turned into a scroll or rosette, and has no appearance of being a continuation of the outer thread in the stem. In the former, the inner threads on the stem unite in a swell or boss near the bowl or fork; while no such swell or boss is found in the latter. It is also to be noted, that, in the former the outline at the end of the enlarged end of the handle has the form of a portion of a trefoil, while, in the latter, it has the form of a Gothic arch; and that, in the former, the surface of the enlarged end between the threads is swelled between the shoulders, and such swell is gradually flattened towards the widest part of the handle, so that the swell at such part is substantially different in appearance from the swell at the shoulders, while, in the latter, the swell is substantially the same from the shoulders to the broadest part of the enlarged end.

The differences thus observed between the plaintiffs' design and the White design of 1867, exist also between the plaintiffs' design and the White design of 1868. In addition, in the plaintiffs' design, the contour of the enlarged end of the handle spreads outward progressively from the shoulders until the widest part of the handle is reached; while, in the White design of 1868, the sides of the enlarged end turn inward for a distance after leaving the shoulder and then spread outwards to the widest part.

From the comparisons thus instituted, it appears, that the plaintiffs' design and the White design of 1867 are, in what has been called outline, very much alike, while they differ from each other in a marked manner in what has been called ornamentation, while the plaintiffs' design and the White design of 1868 differ from each other in a marked manner, both in outline and in ornamentation; and that the two White designs differ from each other in outline in a marked manner, while they scarcely differ at all from each other in ornamentation.

There can be no doubt, in the proofs, that the plaintiffs' design is a very meritorious and salable one. The entire strength of their case, on the question of infringement, is put on the claimed ground, that the resemblance between their design and each of the two designs of White is such as to mislead ordinary purchasers and casual observers, and to induce them to mistake the one design for the other. It is argued, that the merit of a design appeals solely to the eye, and that, if the eye of an ordinary observer cannot distinguish between two designs, they must in law be substantially alike. In the present case, it is claimed that the eye of the ordinary observer is and will be deceived when looking at a handle of the plaintiffs' design and a handle of either of the designs of White, because, in addition to the resemblance in contours, the handles have all of them a threaded pattern around the edges, and small knobbed ornamentations at the shoulders, and small knobbed ornamentations near the end, and a pointed projection at the end, and that the general effect on the eye of the ordinary observer is not and will not be modified by the differences which have been pointed out.

It is impossible to assent to the view, that the test in regard to a patent for a design is the eye of an ordinary observer. The first question that would arise, if such a test were to be admitted, would be, as to what is meant by "an ordinary observer,' and how he is to exercise his observation. One of the witnesses for the plaintiffs testifies, that the plaintiffs' design and the White design of 1867 are sufficiently alike to mislead ordinary purchasers as to their identity, but not on a second examination; and that, if an ordinary purchaser did not have before him a sample of the plaintiffs' design, he would be apt to consider the White design of 1867 to be the same pattern as the plaintiffs' design. Another of the witnesses for the plaintiffs states, that he does not think that an ordinary observer would notice any difference between the two designs on a casual observation. The expert examined for the plaintiffs testifies, that, in saying that the White designs are substantially identical with the plaintiffs' design, he means such an identity as would deceive him when going as a purchaser to ask for one spoon and being shown another, and that, when he saw articles of the plaintiffs' design and of the White design of 1867 separately, he took them to be of the same design, until he laid them side by side and compared them minutely.

The same principles which govern in determining the question of infringement in respect to a patent for an invention connected with the operation of machinery, must govern in determining the question of infringement in respect to a patent for a design. A design for a configuration of an article of manufacture is embraced within the statute as a patentable design, as well as a design for an ornament to be placed on an article of manufacture. The object of the former may solely be increased utility, while the object of the latter may solely be increased gratification to a cultivated taste addressed through the eye. It would be as reasonable to say that equal utility should be the test of infringement in the first case, as to say that equal appreciation by the eye should be the test of infringement in the latter case. There must be a uniform test, and that test can only be, as in the case of a patent in respect to machinery, substantial identity, not in view of the observation of a person whose observation is worthless, because it is casual, heedless, and unintelligent, and who sees one of the articles in question at one time and place, and the other of such articles at another time and place, but in view of the observation of a person versed in the business of designs in the particular trade in question—of a person engaged in the manufacture or sale of articles containing such designs—of a person accustomed to compare such designs one with another, and who sees and examines the articles containing them side by side. The question is not, whether one design will be mistaken for another by a person who examines the two so carelessly as to be sure to be deceived, but whether the two designs can be said to be substantially the same when examined intelligently side by side. There must be such a comparison of the features which make up the two designs. As against an existing patented design, a patent for another design cannot be withheld because, to a casual observer, the general appearance of the latter design is so like that of the earlier one as to lead him, without proper attention, to mistake the one for the other. The same test must be applied on the question of infringement.

Applying these principles to the evidence in this case, and comparing the designs of White with the plaintiffs' design, it is satisfactorily shown, by the clear weight of testimony, that the designs of White are not substantially the same as the plaintiffs' design. The strength of the testimony of the witnesses on the part of the plaintiffs themselves leads to this conclusion. The substance of the evidence of the most intelligent of them, persons in the trade, is merely to the effect that the White designs are not substantially the same as the plaintiffs' design, but were intended to appear to be the same to an ordinary purchaser, and will so appear to him, but that a person in the trade will not be deceived, by the resemblance, into purchasing an article of the one design for an article of the other.

A patent for a design, like a patent for an improvement in machinery, must be for the means of producing a certain result or appearance, and not for the result or appearance itself. The plaintiffs' patent is for their described means of producing a certain appearance in the completed handle. Even if the same appearance is produced by another design, if the means used in such other design to produce the appearance are substantially different from the means used in the prior patented design to produce such appearance, the later design is not an infringement of the patented one. It is quite clear, on a consideration of the points of difference, before enumerated, between the plaintiffs' design and the designs of White, that each of the latter is substantially different from the former in the means it employs to produce the appearance it presents. Such is the undoubted weight of the evidence, and such is the judgment of the Court.

The bill must be dismissed, with costs.

CHARLES M. KELLER, and
CHARLES F. BLAKE,
For the Plaintiffs.
GEORGE GIFFORD,
For the Defendants.

4 McLean 180 —

6 L.R. Chanc appeals

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